

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1938.

No. 7137

SPECIAL CALENDAR.

WILLIAM W. BRUNSWICK, APPELLANT,

vs.

R. N. ELLIOTT, ACTING COMPTROLLER GENERAL
OF THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED MARCH 21, 1938

PRINTED APRIL 15, 1938

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1938.

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vs.

R. N. ELLIOTT, ACTING COMPTROLLER GENERAL
OF THE UNITED STATES, APPELLEE.

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United States Court of Appeals for the District of Columbia

a. In the District Court of the United States
for the District of Columbia.

No. 63083 IN EQUITY

WILLIAM W. BRUNSWICK, *Plaintiff*,

vs.

R. N. ELLIOTT, Acting Comptroller General of the United
States, and R. WALTON MOORE, Acting Secretary of
State, *Defendants*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the
United States for the District of Columbia, at the
City of Washington, in said District, at the times
hereinafter mentioned, the following papers were
filed and proceedings had, in the above-entitled
cause, to wit:—

1 *Bill.*

Filed November 30, 1936

In the District Court of the United States for the District
of Columbia

Holding an Equity Court

EQUITY No. 63083

WILLIAM W. BRUNSWICK Roosevelt Hotel 2101 16th Street,
N. W. Washington, D. C. *Plaintiff*,

vs.

R. N. ELLIOTT, Acting Comptroller General of the United
States, Washington, D. C. R. WALTON MOORE, Acting
Secretary of State, Washington, D. C. *Defendants*.

To the Honorable, the Justice of the above Court:

The plaintiff, William W. Brunswick, respectfully peti-
tions this Honorable Court and avers as follows:

1. That he is a citizen of the United States, a resident of the District of Columbia, and files this bill in his own right, as will hereinafter more fully appear.

2. That the defendant, R. N. Elliott, is a citizen of the United States, commorant the District of Columbia, and is sued in his official capacity as acting Comptroller General of the United States, as will hereinafter more fully appear.

3. That the defendant, R. Walton Moore, is a citizen of the United States, commorant the District of Columbia, is the acting Secretary of State and is sued in such official capacity as will hereinafter more fully appear.

4. That heretofore, to wit, on May 24, 1924, the Congress of the United States passed and the President approved an Act for the reorganization and improvement of the Foreign Service of the United States, and for other purposes, 43 Stat. 144, U. S. C. A. Title 22, Sec. 21, wherein among other things it is provided as follows:

“Sec. 18

(j) That any Foreign Service officer who before reaching the age of retirement becomes totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part, shall, upon his own application or upon order of the President, be retired on an annuity under paragraph (e) of this section: Provided, however, That in each case such disability shall be determined by the report of a duly qualified physician or surgeon designated by the Secretary of State to conduct the examination: Provided further, That unless the disability be permanent, a like examination shall be made annually in order to determine the degree of disability, and the payment of annuity shall cease from the date of the medical examination showing recovery.

“Fees for examinations under this provision, together with reasonable traveling and other expenses incurred in order to submit to examination, shall be paid out of the Foreign Service retirement and disability fund.

“When the annuity is discontinued under this provision, before the annuitant has received a sum equal to the total amount of his contributions with accrued interest, the difference shall be paid to him or to his legal representatives.” * * *

“(m) Whenever any Foreign Service officer, after the date of his retirement, accepts a position of employment the emoluments of which are greater than the annuity received by him from the United States Government by virtue of his retirement under this Act, the amount of the said annuity during the continuance of such employment shall be reduced by an equal amount; Provided, That all retired Foreign Service officers shall notify the Secretary of State once a year of any positions of employment accepted by them stating the amount of compensation received therefrom and whenever any such officer fails to so report it shall be the duty of the Secretary of State to order the payment of the annuity to be suspended until such report is received.”

5. That thereafter by Act approved February 23, 1931, effective July 1, 1931, the Congress of the United States passed a further Act for the grading and classification of clerks in the Foreign Service of the United States, and providing compensation therefor, 46 Stat., 1211,

3 U. S. C. A. Title 22, Sec. 21, Insert page 8, which Act, Sec. 26, sub-paragraph (j) recites verbatim the provisions of the above quoted sub-paragraph (j). The said Act, however, does not recite the provisions of sub-paragraph (m) as above particularly quoted, nor does the said Act contain anything which in anywise conflicts with or nullifies the provisions of the said sub-paragraph (m) hereinabove more particularly set out. Furthermore, the said Act of February 23, 1931, Sec. 28, provides as follows:

“That all provisions of law heretofore enacted relating to diplomatic secretaries and to consular officers, which are not inconsistent with the provisions of this Act, are hereby made applicable to Foreign Service officers when they are designated for service as diplomatic or consular officers, and that all Acts or parts of Acts inconsistent with this Act are hereby repealed.”

6. Wherefore your petitioner is advised and believes, and so believing avers that the said Act of February 23, 1931, while it amends certain other provisions of the Act of May 24, 1924 in nowise alters, changes or amends sub-paragraph (j) or (m) of the said Act of May 24, 1924, and that by virtue of the said Acts the Congress of the United States has provided that a Foreign Service officer who has been

retired under the provisions of sub-paragraph (j) supra shall receive the annuity pay fixed by paragraph (e) of the said Act and may under the provisions of sub-paragraph (m) supra accept a position or office of employment to which emoluments are attached and may realize and enjoy the emoluments thereof without diminution of his retirement pay, unless the said emoluments of the said office so accepted are in excess of the retirement pay received by the said retired officer.

7. That on or about the 24th day of April, 1907 your petitioner was appointed vice and deputy consul and clerk in the Foreign Service of the United States at Barmen, Germany, at a salary of \$750.00 per annum; on or about February 19, 1918 your petitioner was appointed consul, Class VIII, in the Foreign Service of the United States at a salary of \$3000.00 per annum; on or about September 5, 1919 your petitioner was appointed consul, Class VII, in the Foreign Service of the United States, at a salary of \$3,500.00 per annum; on or about July 1, 1924 your petitioner was appointed a Foreign Service officer in the service of the United States at a salary of \$3,500.00 per annum and on or about August 31, 1932 your petitioner was retired for physical disability while serving as consul at Lisbon and Foreign Service officer of Class VIII at a salary of \$3,500.00 per annum, your petitioner being retired under the provisions of Section 26 (j) of the Act of February 23, 1931, and that by reason of the said retirement your petitioner became entitled to receive and has received, except as hereinafter noted, retirement pay in the sum of \$1,623.12 per annum.

8. That thereafter your petitioner was employed by the National Emergency Council as a correspondence dictator, the position being in nowise under the Civic Service of the United States, for a temporary period, beginning on May 9, 1935 and ending on June 30, 1935, for a daily wage of \$7.00 per day, the total amount received on this account being, to wit the sum of \$315.00.

9. That thereafter, to wit, on February 17, 1936 your petitioner was employed as a correspondence clerk in the Resettlement Administration, which position being a temporary one is in nowise under the Civil Service of the

United States, at a salary of \$1,620.00 per annum, which said position your petitioner held until, to wit the
5 3rd day of August, 1936 when he was appointed Assistant Fiscal Accounting Clerk EO 5 for emergency work in the Office of the Commissioner of Accounts and Audits with compensation at the rate of \$1,620.00 per annum by transfer from the Resettlement Administration, and your petitioner is advised and believes and so believing avers that the said position of Assistant Fiscal Accounting Clerk is a temporary position and is not under the Civil Service of the United States.

10. That on or about March 6, 1936 the President of the United States Civil Service Commission, being advised in the premises, submitted to the Comptroller General of the United States the status of your petitioner, and thereupon the defendant R. N. Elliott as Acting Comptroller General of the United States on August 6, 1936, although fully advised that your petitioner had been lawfully retired, after examination and report of a duly qualified physician, by the Secretary of State for permanent disability incurred in line of duty and not due to vicious habits, intemperance or willful misconduct, and further that the emoluments received by your petitioner were not and had never been in excess of your petitioner's retirement pay amounting to \$1,623.12, rendered a decision and entered an order prohibiting the payment of the said retirement annuity to petitioner during the period of petitioner's employment, a copy of the said letter being hereto attached and marked plaintiff's Exhibit A, and thereupon the said defendant, R. N. Elliott, as Acting Comptroller General of the United States, ordered and directed the Secretary of State to suspend the annuity payments accruing to your petitioner under the said statute and to demand a refund from petitioner of the retirement pay received by him for the
6 period of his civilian employment with the National Emergency Council and the Resettlement Administration, as will more fully appear from the letter of defendant R. N. Elliott, dated August 6, 1936, addressed to the Secretary of State, a copy of which is hereto attached and marked plaintiff's Exhibit B.

11. That thereafter the defendant, R. Walton Moore, as Acting Secretary of State, in obedience to the instructions

and demands of defendant, R. N. Elliott, in the capacity of Acting Comptroller General of the United States, wrote your petitioner under date of August 14, 1936 demanding a refund of the sum of \$973.88 alleged to have been paid your petitioner during the period of his employment by the National Emergency Council and the Resettlement Administration covering the period from May 9, 1935 to July 30, 1935 and from February 17, 1936 to July 31, 1936, although fully advised that the said sum so paid to your petitioner was paid out of a special fund created by the Act of May 24, 1924, by means of a deduction of five per cent (5%) from the salaries of all foreign service officers in the service of the United States, known as the Foreign Service Retirement and Disability Fund, to which fund your petitioner had during the period of his employment contributed, and further well knowing that the said Act under Section 18 sub-paragraph (h) provided that:

“None of the moneys mentioned in this section shall be assignable, either in law or equity, or be subject to execution, levy, or attachment, garnishment, or other legal process.”

and further well knowing that both of the above-referred to provisions appeared in Section 21 of the Act of 1931, particularly sub-paragraphs (c) and (h).

12. That thereafter the defendant R. N. Elliott, 7 purporting to act in the capacity of Acting Comptroller General of the United States, on to wit October 28, 1936 addressed a further letter to the Honorable Secretary of State, a copy of which is particularly set out in Exhibit C, hereto attached and prayed to be made a part hereof, the said defendant, R. N. Elliott, being on the date the said letter was written fully advised that your petitioner had initiated proceedings in Law Cause No. 88171 for a writ of mandamus to procure an interpretation of the meaning of this Act, as will more fully appear by reference to the said cause, heretofore dismissed on the 30th day of November, 1936.

13. That the said defendant, R. N. Elliott, so acting as aforesaid and seeking thereby to injure and damage the plaintiff by requiring an immediate refund of the said sum of \$973.88 and to prevent the defendant, R. Walton Moore, Acting Secretary of State and his subordinates, from

making any other or further payments to plaintiff as the same became lawfully due and payable, and seeking by the said device to injure and damage the plaintiff before his rights could be determined in the aforesaid Law Cause No. 88171 wrote the said letter, particularly referred to as plaintiff's Exhibit C, and thereby is preparing and endeavoring to induce and compel the defendant, R. Walton Moore, as Acting Secretary of State, to participate with him in unlawfully forcing the plaintiff to repay the said sum of \$973.88, and to discontinue the making of further payments as herein particularly complained of.

14. Your petitioner is advised and believes and so believing avers that neither the defendant, R. Walton Moore, Acting Secretary of State, or any other officer of the State Department, has made or entered any order, or finding, in anywise changing plaintiff's status, except that the
8 said defendant as Acting Secretary of State has heretofore discontinued and caused to be discontinued the payment of the annuity to which plaintiff is lawfully entitled under the above-referred to statutes, and that the defendant, R. Walton Moore, Acting Secretary of State, in compliance with the demands of the defendant, R. N. Elliott, Acting Comptroller General of the United States, will require and compel plaintiff to repay the said sum of \$973.88 unless otherwise prohibited and restrained by the action of this Honorable Court.

15. Your petitioner further avers that since, to wit the 1st day of September, 1936, he has not been paid any portion of his retirement allowance of \$1623.12 per annum, contemplated by law to be paid to him, and that there is now due and owing to him, and will continue to accrue under the terms of the said law, monthly payments in the sum of \$135.26, as a result whereof your petitioner is now suffering, and will continue to suffer, a serious loss and damage, all as the direct and immediate result of the unlawful action of the defendant herein.

16. Your petitioner further says that in addition to the said loss of retirement fund the said defendant, Acting Comptroller General of the United States, has caused to be raised and asserted against him a claim for \$973.88, as evidenced by the letter of the Acting Secretary of State,

hereto attached as plaintiff's Exhibit D, and that the defendant, R. N. Elliott, so acting as aforesaid, has to wit under date of October 28, 1936 made a further and more insistent demand upon the defendant, R. Walton Moore, Acting Secretary of State, for the recovery and repayment by the plaintiff of the sum of \$973.88, so unlawfully charged against him by the said defendant, R. N. Elliott, as
9 hereinabove more particularly set out, and is threatening and preparing to offset the said amount of \$973.88 against the salary now being earned by the plaintiff herein.

17. Your petitioner further says that the action of the defendant, R. N. Elliott, herein in so ordering the suspension by the defendant, R. Walton Moore, Acting Secretary of State, of the further payment of the retirement fund due and owing to him under and by virtue of the Acts of Congress, as above set out, is unlawful and contrary to the spirit, purpose and intent of the above-quoted portions of the said Acts of Congress, and is an arbitrary and unlawful exercise of authority by the said defendant, R. N. Elliott, for the reason that the said Acts invested the said defendant R. N. Elliott with no discretionary or other authority over the payment of the said retirement fund to your petitioner, and petitioner further says that the duty conferred upon the defendant, R. N. Elliott, by the said statutes is the ministerial duty to pay or approve the payment to your petitioner of the said sum so fixed by law and authorized by the action of the Secretary of State, as and when the same shall become due and payable under the terms of the said Acts, and that the defendant, R. N. Elliott, has not only failed and refused, but is failing and refusing to perform this ministerial function and is otherwise seeking to unlawfully recover from your petitioner the aforesaid sum of \$973.88, all as more particularly appears hereinabove.

18. That as further evidence of the purpose and intent of the defendant, R. N. Elliott, to unlawfully interfere with the rights of your petitioner, as hereinabove particularly set out, and to compel him forthwith to pay the said sum of \$973.88, the said defendant, R. N. Elliott, did on November 7, 1936 in Certificate No. U. S.-4277-S, United
10 States Claim No. COL-0399209, unlawfully and with-

out authority proceed to issue a notice of settlement of claim, wherein the said defendant, R. N. Elliott, found the plaintiff was indebted to the United States in the sum of \$973.88, and thereupon called upon the plaintiff to remit the same to his office promptly by check, draft or money order payable to the United States, all as will more particularly appear from a copy of the said notice hereto attached and marked plaintiff's Exhibit E.

Wherefore the premises considered, your petitioner prays:

1. That a rule issue out of this Honorable Court requiring the defendant, R. N. Elliott, to appear on a day certain to be named therein and show cause, if any he has, why an injunction pendente lite should not issue out of this Court restraining the said defendant from collecting or attempting to collect or calling upon any officer of the government to collect the said sum of \$973.88 or any part thereof.

2. That a mandatory order issue out of this Honorable Court requiring the Acting Secretary of State, and his subordinates, to pay to the plaintiff the retirement allowance to which he is entitled under the Act of February 23, 1931, to wit the sum of \$1,623.12 per annum.

3. That after final hearing herein an injunction issue against the defendant R. N. Elliott, enjoining and prohibiting him from interfering or in anywise preventing the payment to the plaintiff of the retirement allowance to which he is entitled under the Act of February 23, 1931, to wit the sum of \$1,623.12 per annum, and that the said R. N. Elliott, Acting Comptroller General of the United States, be enjoined and prohibited from otherwise collect-
11 ing or attempting to collect from the plaintiff the said sum of \$973.88 on account of the matters and things herein set out, or any other sum.

4. And for such other and further relief as to the Court may seem meet and proper.

WILLIAM W. BRUNSWICK

DISTRICT OF COLUMBIA, ss:

I, WILLIAM W. BRUNSWICK, being first duly sworn, depose and say that I am the plaintiff in this cause, that I have

read the foregoing bill by me subscribed and know the contents thereof; that the matters and things therein stated as of my personal knowledge are true, and those based upon information and belief, I verily believe to be true.

WILLIAM W. BRUNSWICK

Subscribed and sworn to before me this 25th day of Nov., 1936.

FANNY E. FREEMAN

(Notarial Seal)

Notary Public for D. C.

Huston Thompson

Attorney for Plaintiff

12

Plaintiff's Exhibit A

Comptroller General of the United States

Washington

August 6, 1936 LLH

President,

United States Civil Service Commission.

Sir:

Consideration has been given your letter of July 22, 1936, as follows:

“Under date of March 6, 1936, the Chief of the Appointment Section, Resettlement Administration, by direction of the Administrator, requested that clearance of record be given, in accordance with the President's request of October 2, 1934, to permit the appointment of William Washington Brunswick, who claimed prior service in the State Department and the National Emergency Council. In assembling his record it was disclosed that Mr. Brunswick had been employed in the Consular Service as follows:

2-24-07 Appointed vice and deputy consul and clerk, \$750 per annum, Barmen, Germany.

2-19-18 Consul, Class VIII, \$2500 per annum, Foreign Service.

- 9-5-19 Appointed consul, Class VII, \$3000 per annum, Foreign Service.
- 7-1-24 Foreign Service officer, \$3500 per annum.
- 8-31-32 Retired for physical disability while serving as consul at Lisbon and foreign service officer of Class VIII, \$3500 per annum. Retired for physical disability under the provisions of Section 26 (j) of the Act of February 23, 1931.

“The report from the National Emergency Council shows that Mr. Brunswick was employed as a correspondence dictator, \$7.00 per diem, from May 9, 1935 to June 30, 1935. A telephonic inquiry of the Resettlement Administration elicits the information that he was appointed as a correspondence clerk, \$1620 per annum, in that agency on February 17, 1936, and is still serving.

“The records of this Commission show Mr. Brunswick was born October 17, 1882. He, therefore, has not yet reached the automatic retirement age for Foreign Service officers, which is 65 years.

13 “The Department of State advises that Mr. Brunswick was retired from the Foreign Service for permanent disability for duty in the Foreign Service.

“There is no specific provision in the retirement law for Foreign Service (46 Sta. 1211) which prohibits a retired officer from engaging in other Government work.

“However, in your decision of October 6, 1934 (14 Comp. Gen. 285) you stated that the purpose and intent of civil retirement legislation is entirely inconsistent with the dual payment of active service pay and civilian retirement annuity to the same person for the same period of time, and set forth in the general principle that:

‘In no case may both retirement annuity and civilian compensation be paid to the same person for the same period of time.’ This principal was made applicable to any reemployment in any capacity in the Government civil service which may be counted toward longevity in computing retirement annuity. The service of Mr. Brunswick in the position he is now holding may not be counted toward longevity under the terms of the retirement law for Foreign Service.

“In order that this Commission may be in a position to take proper action when an annuitant under the retirement law is proposed for appointment to a position in the classified service, your decision on the following questions is requested:

“1. May a Foreign Service Officer of the State Department, retired for reasons other than having reached automatic retirement age, be reemployed in the executive civil service?

“2. If your answer to the foregoing question is in the affirmative, may both civilian compensation and retirement annuity be paid over the same period of time?”

While there is found no prohibition in the Foreign Service Retirement Act against reemployment of foreign service officers retired for disability, it was held in a similar case involving a retired lighthouse employee, 10 Comp. Gen. 309, quoting from the syllabus:

“An employee of the Lighthouse Service who was retired under the act of June 20, 1918, 40 Stat. 608, upon his own request, having reached the optional age of retirement of 65 years and having had 30 years’ service, may be reinstated or reemployed on the active list at any time prior to reaching the compulsory retirement age of 70 years, only upon the relinquishment of his retired status and discontinuance of the retired pay incident thereto.”

See also 14 Comp. Gen. 586, involving a retired employee of the Panama Canal, in which it was held at pages 588, 589:

“There is no provision of law either in the Panama Canal Retirement Act or in any other statute which
14 authorizes the receipt of retirement annuity and active civilian compensation by the same person for the same period of time.

“Independently of the terms of the Panama Canal Retirement Act cited by you and notwithstanding that the provisions of the Civil Retirement Act more specifically safeguard against such dual payment by the Government—payment of retirement annuity at the same time the annuitant is drawing pay for active service—such dual payments would be wholly inconsistent with the basic purpose underlying civil retirement legislation and would violate a broad

principle long recognized in governmental affairs. 10 Comp. Gen. 309, 13 *id.* 54; 14 *id.* 285, 288; *id.* 425, 426.

Compare, also, 14 Comp. Gen. 791.

Answering your question specifically you are advised that there is no prohibition of law against the reemployment in the executive civil service of a former foreign service officer—who has not attained the age for automatic retirement—retired for disability, but his retirement annuity may not be paid concurrently for the period of such employment. See inclosed copy of letter of this date to the Secretary of State.

Respectfully,

(signed) R. N. ELLIOTT (typed)

*Acting Comptroller General of
the United States.*

Inclosure.

Plaintiff's Exhibit B

Comptroller General of the United States

Washington

August 6, 1936.

A-61967

The Honorable,

The Secretary of State.

Sir:

Your attention is invited to the inclosed copy of 15 decision of today to the President of the United States Civil Commission, concerning the retirement status of William W. Brunswick former foreign service officer, who is reported to have been retired for disability August 31, 1932. The report of the Civil Service Commission discloses that this retired officer has been drawing retirement annuity and civilian compensation concurrently for the same periods of time. In accordance with the decision of today, and the authorities therein cited, his retirement annuity should be immediately suspended and the annuitant requested to refund all annuity received for the period of his civilian employment with the National Emer-

gency Council and the Resettlement Administration. It is requested that this office be advised of the administrative action taken in the matter.

Respectfully,

(signed) R. N. ELLIOTT.

*Acting Comptroller General of
the United States.*

Inclosure.

Exhibit C

Comptroller General of the United States

Washington

A-61967

October 28, 1936

The Honorable,

The Secretary of State.

Sir:

There has been received your letter of October 10, 1936, as follows:

“Reference is made to your letter A-61967 of August 6, 1936, enclosing copy of your decision A-61967 of August 6, 1936, to the President of the United States Civil Service Commission, regarding the payment of a retirement annuity to William W. Brunswick, retired American Foreign Service officer, while receiving compensation from the Government for civilian employment.

“There is enclosed a copy of a communication of September 28, 1936, from Mr. Brunswick, in which this retired officer states that he is advised that the action of the Comptroller General is not authorized by law, and is contrary to the Act under which he received the annuity, and that he will take up the matter further in the near future.

“A copy of Mr. Brunswick’s letter is being sent to the Civil Service Commission.”

In the letter of August 6, 1936, it was stated:

“... In accordance with the decision of today, and the authorities therein cited, his retirement annuity should be

immediately suspended and the annuitant requested to refund all annuity received for the period of his civilian employment with the National Emergency Council and the Resettlement Administration. It is requested that this office be advised of the administrative action taken in the matter."

The letter of Mr. Brunswick, merely stating that he is advised that the action of the Comptroller General is not authorized by law, discloses no reason for delaying the suspension of his annuity or for not taking steps to secure a refund of the amounts already erroneously paid. Accordingly, you are again requested to take the action requested in the letter of August 6, 1936.

Respectfully,

(signed) R. N. ELLIOTT,

*Acting Comptroller General of
the United States.*

17

Plaintiff's Exhibit D

Department of State

Washington

August 14, 1936

In reply refer to
FA 123 B 831/229

William W. Brunswick, Esquire,
American Foreign Service Officer, Retired,
Care of Roosevelt Hotel,
2101 Sixteenth Street, Northwest,
Washington, D. C.

Sir:

There is enclosed a copy of a letter of August 6, 1936, from the Acting Comptroller General of the United States, together with a copy of its enclosed decision A-61967 of August 6, 1936, to the President of the United States Civil Service Commission, holding that you may not receive retirement annuity while at the same time receiving compensation from the Government for civilian employment.

It is of course the duty of this Department to comply with the law as construed by the Comptroller General and it must therefore request you to refund the amount of \$973.88 for deposit to the credit of the Foreign Service Retirement and Disability Fund on account of annuity of \$234.46 paid to you for the period May 9 to June 30, 1935, and of \$739.42 paid to you for the period February 17 to July 31, 1936.

You are requested to keep the Department informed as to your employment.

Very truly yours,

/s/ WILLIAM PHILLIPS

Acting Secretary of State.

Enclosure:

From the Acting Comptroller
General of the United States,
A-61967 of August 6, 1936,
with enclosure.

18

Exhibit E

General Accounting Office

Form 2042a

Notice of Settlement of Claim

General Accounting Office

Washington, D. C. Nov. 7, 1936

In reply refer to

Certificate No. U. S-4277-S

State Settlements and Claims

United States Claim No. COL-0399209

William W. Brunswick,

Roosevelt Hotel,

Washington, D. C.,

Debtor

The claim(s) of the United States for the amount of \$973.88 received as Foreign Service retirement annuity

during the periods May 9 to June 30, 1935, and February 17 to July 31, 1936, while employed by the National Emergency Council and by the Resettlement Administration. Payments of retirement annuity may not be made concurrently with salary upon reemployment. 10 Comp. Gen. 309; 13 *id.* 54; 14 *id.* 285, 288; *id.* 425, 426.

has (have) been settled and the sum of nine hundred seventy-three dollars and - - - - eighty-eight - - - - cents has been found due the United States per above certificate number. The amount due should be remitted to this office promptly, by check, draft, or money order payable to the "United States."

R. N. ELLIOTT

*Acting Comptroller General of
the United States.*

By P. W. EATON

\$973.88

Note.—If a debtor desires a review of this settlement, or any item thereof, application should be filed, with a statement of the reasons therefor, within one year from the date hereof, in the Division of Law, Office of the Comptroller General.

19

Rule to Show Cause

Filed November 30, 1936

* * *

Upon consideration of the verified petition herein by the plaintiff filed, it is by the Court this 30th day of November, 1936,

ORDERED, ADJUDGED and DECREED that the defendant, R. N. Elliott, Acting Comptroller General of the United States, appear at 10 o'clock A. M. on the 16th day of December, 1936 and show cause if any he has why an injunction pendente lite should not issue out of this Court restraining the said defendant from collecting or attempting to collect or calling upon any officer of the government to collect the said sum of \$973.88 or any part thereof, as particularly set out in the bill herein filed, provided a copy

of this rule is served upon the said defendant on or before the 10th day of December, 1936.

JOSEPH W COX

Justice

MARSHAL'S RETURN

Served a copy of the within above rule on within named R. N. Elliott, By serving chief clerk PERSONALLY December 2, 1936.

JOHN B. COLPOYS,

*U. S. Marshal in and for the
Dist. of Columbia*

By JAMES McCARTHY

Deputy U. S. Marshal
O.

Joint Answer of Defendants

Filed December 14, 1936

* * *

Come now, R. N. Elliott, as Acting Comptroller General of the United States, under the provisions of section 302, act of June 10, 1921, 42 Stat. 23, and R. Walton Moore, as Acting Secretary of State—in the absence of the Secretary of State, and pursuant to Executive Order No. 7487-A of November 6, 1936—defendants herein, now and at all times saving and reserving unto themselves the benefits of all objections and exceptions to the errors and insufficiencies of the bill of complaint filed herein, and reserving unto themselves all benefits of the lack of jurisdiction of the court appearing upon the face of said bill to grant the relief prayed for, and the lack of jurisdiction of the court to enjoin or restrain the defendant, R. N. Elliott, as Acting Comptroller General of the United States in the performance of the discretionary duties conferred and enjoined upon him by the statutory laws of the United States, and the lack of jurisdiction of the court to issue a mandatory order upon the defendant, R. Walton Moore, as Acting Secretary of State, and his subordinates, to perform the act prayed for, and relying upon the same for answer to so

much of the said bill of complaint as the said defendants are advised is material for them to answer, and to the rule to show cause herein so far as the defendant, R. N. Elliott, as Acting Comptroller General of the United States, is concerned, admit, deny, and aver as follows:

1. Defendants admit the allegations of paragraph 1 of the bill.

21 2. Defendants admit the allegations of paragraph 2 of the bill.

3. Defendants admit that R. Walton Moore is the Acting Secretary of State and that he is a citizen of the United States, and aver that he is a resident of the State of Virginia and not commorant the District of Columbia as alleged in paragraph 3 of the bill.

4. Defendants admit the allegations of paragraph 4 of the bill.

5. Defendants admit the allegations of paragraph 5 of the bill, except that they deny the act of February 23, 1931, 46 Stat. 1207, contains nothing which conflicts with or repeals the provisions of subparagraph (m) of the act of May 24, 1924, but on the contrary say that the said paragraph (m) is abrogated and repealed by omission from the provisions of the later act approved February 23, 1931, 46 Stat. 1207, which restates the act as amended and does not state the amendments only—it being provided by section 7 of the said latter act:

“That the Act (Public Numbered 135, Sixty-eighth Congress) approved May 24, 1924, entitled ‘An Act for the reorganization and improvement of the Foreign Service of the United States, and for other purposes,’ *be, and the same is hereby, amended to read as follows:*” (Underscoring supplied for emphasis.)

Further answering the allegations of paragraph 5 of the bill, the defendants aver that the said act is a new act and such provisions of the prior act as do not appear therein necessarily are no part of the law thereafter. Subparagraph (m) relied upon by the plaintiff was entirely omitted from the revised and amended enactment and was in no-wise saved by the provisions of section 28 of the latter act.

6. The allegations of paragraph 6 of the bill are conclusions of law which the defendants are not required to admit or deny.

22 7. Defendants are informed and believe that the allegations of fact contained in paragraph 7 of the bill are true, and admit the same insofar as they are statements of fact, but deny that plaintiff became entitled to receive any retirement pay during any period of time that he was also receiving emoluments for services from the Government of the United States.

For further answer to paragraph 7, defendants aver that the plaintiff was and is entitled to receive retirement pay in the amount of \$135.26 per month except for such period as he has received or shall receive pay, emoluments, or compensation from the Government of the United States for services performed in any branch thereof.

8. Defendants are informed and believe that the allegations of paragraph 8 of the bill are true.

9. Defendants are informed and believe that the allegations of paragraph 9 of the bill are true.

10. Defendant, R. Walton Moore, as Acting Secretary of State, avers that the allegations of paragraph 10 of the bill do not relate to him or to any action taken by him except as to the act of having retired the plaintiff under the law, and for that reason he is not required to answer further the allegations of paragraph 10 of the bill.

Defendant, R. N. Elliott, as Acting Comptroller General of the United States, admits the receipt of letter of the President, Civil Service Commission, but says the date of said letter was July 22, 1936, as evidenced by Exhibit "A" of the bill, and not on or about March 6, 1936, as stated by plaintiff; and that in reply thereto the Acting Comptroller General of the United States issued the letter of August 6, 1936, copy of which is attached to the bill as Exhibit "A". For full information as to contents thereof

23 and conclusions therein reached the Court is respectfully referred to said letter. The defendant, R. N. Elliott, as Acting Comptroller General of the United States, further admits the writing of the letter dated August 6, 1936, to the Secretary of State, referred to as Exhibit "B" of the bill, and for full information as to contents thereof and conclusions therein reached the Court is respectfully referred to said letter.

11. Defendant R. N. Elliott, as Acting Comptroller General of the United States, avers that the allegations of

paragraph 11 do not relate to him or to any action taken by him except as to having rendered his decision in the matter and for that reason he is not required to answer further.

Defendant R. Walton Moore, as Acting Secretary of State, denies that he wrote to the plaintiff the letter of August 14, 1936, copy of which is made Exhibit "D" of the bill, but says that said letter was written by William Phillips, as then Acting Secretary of State, upon receipt of the copy of the decision of August 6, 1936, by the defendant, R. N. Elliott, as the Acting Comptroller General of the United States, copy of which decision is made Exhibit "A" of the bill; that said decision of the Acting Comptroller General of the United States constituted, and was his construction and interpretation of the law applicable to the case presented and required of him in the performance of his statutory duties involving the use of public moneys; and that upon being apprised of said decision it thereupon became the duty of the Acting Secretary of State to conform with said construction of the law by the Acting Comptroller General by calling upon the plaintiff herein,

as per Exhibit "D" of the bill, to request refund of
24 the amount of retirement annuity thus held to have been unlawfully paid, well knowing further, the requirements of section 4 of the act of July 31, 1894, 28 Stat. 206, as amended by section 304 of the act of June 10, 1921, 42 Stat. 24, that:

"The General Accounting Office shall superintend the recovery of all debts finally certified by it to be due to the United States."

and of the provisions of section 236, Revised Statutes as amended by section 305 of the act of June 10, 1921, 42 Stat. 24, that:

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

Defendant R. Walton Moore, as Acting Secretary of State, further answering, admits that the sum of \$973.88 was paid to the plaintiff out of the special fund created

by the act of May 24, 1924—as amended by the act of February 23, 1931—to which fund the plaintiff had contributed, but in this regard said special fund, known as the Foreign Service Retirement and Disability Fund, does not consist *solely* of deduction of five percent (5%) from the salaries of all foreign service officers in the service of the United States, but said fund consists, also, of appropriated moneys, it being provided in subsection (a) of section 18 of the act of May 24, 1924—now subsection (a) of section 26 of the amendatory act of February 23, 1931—that:

“The Secretary of State shall submit annually a comparative report showing all receipts and disbursements on account of refunds, allowances, and annuities, together with the total number of persons receiving annuities and the amounts paid them, and shall submit annually estimates of appropriations necessary to continue this section in full force and such appropriations are hereby authorized: *Provided*, That in no event shall the aggregate total appropriations exceed the aggregate total of the contributions of the Foreign Service officers theretofore made, and
25 accumulated interest thereon.”

\$162,400 having been appropriated for the fiscal year 1936 by the act of March 22, 1935, 49 Stat. 71, and \$185,300 having been appropriated for the fiscal year 1937 by the act of May 15, 1936, 49 Stat. 1313, and certain other amounts having been appropriated for other prior fiscal years in respect of said Foreign Service Retirement and Disability Fund. Furthermore, this defendant says that the total amount contributed to said retirement fund by the plaintiff consists of \$1,429.15 and that said plaintiff has been paid retired annuity from the said fund the total sum of \$6,357.22 up to the period ending July 31, 1936, or an excess of \$4,928.07 over and above the amount of plaintiff's contribution to said fund.

Defendant, R. Walton Moore, as Acting Secretary of State, further says that the refund demanded from the plaintiff in letter of August 14, 1936, *supra*, constituted no attachment, levy, or seizure of any money in the special fund, *supra*, within the meaning of the provisions of subparagraph (h) of section 18 of the act of May 24, 1924, quoted in paragraph 11 of the bill, but on the contrary,

constituted merely a demand for return of moneys unlawfully paid out of the said special fund, which it was his plain duty to make under administrative policy and law, upon receipt of the decision of the Acting Comptroller General of the United States.

Further answering, defendant R. Walton Moore, as Acting Secretary of State, denies that the provisions of subparagraphs (c) and (h) of paragraph 18 of the act of May 24, 1924, appear in section 21 of the act of 1931 as alleged by plaintiff, but on the contrary says that said subparagraphs were carried forward in section 26 of the act of February 23, 1931.

For further answer to paragraph 11 of the bill this
26 defendant says that the length of plaintiff's service in the National Emergency Council and Resettlement Administration as alleged in said paragraph 11 of the bill is not consistent with the period of service alleged to have been performed in said branches of the Government of the United States as alleged in paragraphs 8 and 9, respectively, of the bill.

12. Defendant R. Walton Moore, as Acting Secretary of State, avers that the allegations of paragraph 12 of the bill do not relate to him or to any action taken by him and for that reason he is not required to answer the same.

Defendant, R. N. Elliott, as Acting Comptroller General of the United States, admits writing the letter of October 28, 1936, to The Honorable, The Secretary of State, referred to as Exhibit "C" of the bill, but denies that, at the time of the signing of said letter, he was aware or advised that the plaintiff had initiated proceedings in Law Cause No. 88171 for a writ of mandamus to procure an interpretation of the meaning of the Foreign Service Retirement Act—as alleged in paragraph 12 of the bill. This defendant avers that he was not aware of the dismissal of said law cause until there was served upon him the herein bill and rule to show cause.

13. Defendant, R. Walton Moore, as Acting Secretary of State, avers that the allegations of paragraph 13 of the bill do not relate to him or to any action taken by him and for that reason he is not required to answer the same.

Defendant, R. N. Elliott, as Acting Comptroller General of the United States, denies that by his letter of October 28, 1936, *supra*, he is seeking to injure and damage the plain-

tiff and to prevent the defendant, R. Walton Moore, Acting Secretary of State, and his subordinates from making further payment of retired pay to the plaintiff as they lawfully become due and payable, and denies, also, that any action therein taken by him was unlawful, but avers that said letter was in reply to a letter, dated October 10, 1936, from the Assistant Secretary, a copy of which is hereto attached and marked defendants' Exhibit "A", who inclosed for the consideration of this defendant, a copy of letter written on September 28, 1936, by the plaintiff to The Honorable, The Secretary of State, copy of which is hereto attached and marked defendants' Exhibit "B", in pertinent part as follows:

"In reference to refund of annuity received while employed, I am advised that the action of the Comptroller General is not authorized by law, and is contrary to the Act under which I received the annuity. Under these circumstances I will in the near future take the matter up further." Further, this defendant avers that the purpose of said letter of October 28, 1936, was to inform The Honorable, The Secretary of State, of the effect to be given the said letter of the plaintiff with relation to the Acting Comptroller General's decision of August 6, 1936. For full information as to contents of said letter of October 28, 1936, forming Exhibit "C" of the bill, and the conclusion therein reached, the Court is respectfully referred to said letter.

14. Defendant, R. N. Elliott, as Acting Comptroller General of the United States, avers that the allegations of paragraph 14 of the bill do not relate to him or to any action taken by him except as to his decision in the matter, and for that reason he is not required to answer further.

Defendant, R. Walton Moore, as Acting Secretary of State, is informed and believes that the allegations of paragraph 14 are true insofar as they are statements of fact, but denies the conclusions of law in said paragraph.

28 15. Defendants are informed and believe the allegations of paragraph 15 are true insofar as they are statements of fact, but deny the conclusions of law in said paragraph and deny, also, that the plaintiff is suffering and will continue to suffer any loss or damage whatsoever, and further deny that any actions of the defendants herein have been unlawful.

16. Defendant, R. Walton Moore, as Acting Secretary of State, admits the raising and asserting of a claim against the plaintiff for the sum of \$973.88 as evidenced by letter of the Acting Secretary of State, referred to as Exhibit "D" of the bill, and says that it became and was his duty to take such action upon receipt of the copy of the decision by the defendant, R. N. Elliott, as the Acting Comptroller General of the United States, which constituted his construction and interpretation of the law applicable to the case presented and required of him in the performance of his statutory duties involving the use of public moneys, well knowing, also, the provisions of section 4 of the act of July 31, 1894, as amended, and of section 236, Revised Statutes, as amended, *supra*.

Defendant, R. N. Elliott, as Acting Comptroller General of the United States, admits the writing of the letter of October 28, 1936, to The Honorable, The Secretary of State, but denies that said letter constituted more insistent or any demand upon the defendant, R. Walton Moore, Acting Secretary of State, for the recovery and repayment by the plaintiff of the sum of \$973.88, but avers that said letter merely advised the Secretary of State in respect of a letter written by the plaintiff to the Secretary of State under date of September 28, 1936, in regard to his case, more particularly referred to herein under answer to paragraph 29 13, hereof, and forming defendants' Exhibit "B" herein.

The defendant, R. N. Elliott, as Acting Comptroller General of the United States, further denies that the sum of \$973.88 was unlawfully charged against the plaintiff, but on the contrary says that said amount was unlawfully received by said plaintiff during such time as he was otherwise in receipt of salary, pay, or emoluments while employed by the Government of the United States, and that he is not entitled to retain the same.

Defendant, R. N. Elliott, as Acting Comptroller General of the United States, denies, also, that he is threatening or has at any time threatened, or that he is preparing to offset the said amount of \$973.88 against the salary now being earned by the plaintiff as alleged in paragraph 16 of the bill.

17. Defendant, R. Walton Moore, as Acting Secretary of State, avers that the allegations of paragraph 17 of the bill

do not relate to him or to any action taken by him except the demand made for return of the retired pay unlawfully paid to the plaintiff and the suspension of plaintiff's retired pay, and, therefore, he is not required to answer further.

Defendant, R. N. Elliott, as Acting Comptroller General of the United States, is advised and believes the allegations of paragraph 17 are argumentative and consist solely of conclusions of law and that the defendant is not required to admit or deny the same; but this defendant says that if the same be material he denies each and every allegation of paragraph 17 of the bill and demands strict proof thereof.

18. Defendant, R. Walton Moore, as Acting Secretary of State, avers that the allegations of paragraph 18 of the bill do not relate to him or to any action taken by
30 him and for that reason he is not required to answer the same.

Defendant, R. N. Elliott, as Acting Comptroller General of the United States, admits the issuance on November 7, 1936, of Certificate of Settlement No. US-4277-S in which the plaintiff was certified as indebted to the United States in the sum of \$973.88 as indicated in Exhibit "E" of the bill, but defendant denies that the purpose of such action was to unlawfully interfere with the rights of the plaintiff, but on the contrary says that such action was required because of the duties imposed upon him by law under the provisions of section 4 of the act of July 31, 1894, 28 Stat. 206, as amended by section 304 of the act of June 10, 1921, 42 Stat. 24, that:

"The General Accounting Office shall superintend the recovery of all debts finally certified by it to be due to the United States."

and of the provisions of section 236, Revised Statutes, as amended by section 305 of the act of June 10, 1921, 42 Stat. 24, that:

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

19. For a further, separate, and affirmative defense to the bill herein defendants aver:

(a) That subparagraph (m) of section 18 of the act of May 24, 1924, which was omitted from the amendatory act of February 23, 1931, became abrogated thereby and was thereafter no part of the statute and that there was no authority for the payment of retired pay to a foreign service officer thereafter retired on account of a permanent disability pursuant to the provisions of subsection (j) of section 26 of the act of February 23, 1931, during such time as such retired foreign service officer should be in receipt of emoluments for services rendered the United States Government through his acceptance of a position therein.

(b) That under existing law it became the duty of the Acting Comptroller General of the United States to render an opinion on the question presented by the President, Civil Service Commission, in his letter of July 22, 1936, copied in its entirety in the decision of the Acting Comptroller General of the United States dated August 6, 1936, A-61967, copy attached to the bill as Exhibit "A", and that in the exercise of the duty and jurisdiction conferred by law said Acting Comptroller General of the United States did render his decision of August 6, 1936, *supra*; that that decision involved the construction of applicable statutes and required the exercise of sound judgment and discretion; that his construction of said statutes was and is correct as he verily believes; that the said decision was not made arbitrarily or capriciously, but in any event, it being the exercise of sound judgment and discretion it cannot be reviewed in a suit for mandatory injunction or order, and the court may not substitute its judgment for that of the Acting Comptroller General of the United States.

Furthermore, defendants aver that the sole object of this proceeding here is to establish a claim against the United States and to have this Court restrain the Acting Comptroller General of the United States from obeying a specific injunction of the law as to what effect he shall give his own decisions, and that the issuance of such a writ as prayed in respect of the defendant, R. N. Elliott, as Acting Comptroller General of the United States, would result in direct conflict with the law fixing his jurisdiction and would seriously interfere with the control of the Congress over the public moneys, disrupt the functioning of

the accounting system through the substitution of peremptory judicial writs for decisions of the Comptroller General of the United States or Acting Comptroller General of the United States.

(c) That decision, A-61967, dated August 6, 1936, of the Acting Comptroller General of the United States to the President, United States Civil Service Commission (Exhibit "A" of the bill), holding that the plaintiff's retirement annuity may not be paid concurrently for the period of his employment in the service of the United States Government was predicated upon the law in effect at the time of the plaintiff's retirement and the broad principle long recognized in governmental affairs and followed in numerous decisions of the Comptroller General of the United States, that dual or concurrent payments of retired and active civil pay is inconsistent and incompatible with the basic purpose underlying civil retirement legislation—retired pay being in lieu of active service pay. Furthermore, it being provided in section 27 of the act of February 23, 1931, to the effect that in the event any retired foreign service officer may be recalled temporarily to active service the right to receive retired pay is suspended while so serving, it follows with equal force that the right to receive retired pay is likewise suspended during such time as he is otherwise in receipt of compensation, salary, or other emoluments from the Government of the United States when actually employed in another branch of its service.

(d) That the Acting Comptroller General of the United States in rendering a decision involving the uses of public money as in this matter, has not performed any ministerial duty nor is he required to perform a ministerial duty

33 in the matter of the plaintiff's retired pay, but that his duty in the matter was to construe and apply the law and legal principle applicable thereto and he says that such duty was performed by his decision of August 6, 1936, Exhibit "A" of the bill. See *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 325; also *Lynch v. United States*, 137 U. S. 280, 286.

(e) That the Acting Secretary of State is not a disbursing officer and that there is no statute making it his duty or the duty of any of his subordinates, or which would permit him or any of his subordinates, to draw funds to pay the

plaintiff retired pay, and that, therefore, a direction to the Acting Secretary of State as prayed for would be futile. *Howden & Co. v. Standard Shipbuilding Corporation*, 17 Fed. (2d) 530.

(f) That the action of the Acting Secretary of State in requesting said refund and in suspending payment of retired annuity during any period plaintiff may be employed by the United States was and is not arbitrary and capricious, but his plain duty in conformity with the construction of applicable law as laid down by the Acting Comptroller General of the United States.

20. Further answering the defendants aver:

(a) That the plaintiff has a full, adequate, and complete remedy at law, if any, by a suit in the Court of Claims, which is the only remedy which the Congress has provided for the plaintiff and others in his situation who disagree with the decisions of the defendant, R. N. Elliott, as Acting Comptroller General of the United States, respecting what
34 uses may be made of the appropriated moneys of the United States or other special funds which are required to be accounted for to the United States.

(b) That the bill herein states no facts, which, if true, would entitle plaintiff to the relief sought.

WHEREFORE, the defendants, R. N. Elliott, as Acting Comptroller General of the United States, and R. Walton Moore, as Acting Secretary of State, having fully answered, pray this honorable court to discharge the rule issued herein and to dismiss the bill of complaint for an injunction *pendente lite* and otherwise and for a mandatory order, and that they may have their costs assessed against the plaintiff.

R. N. ELLIOTT

*Acting Comptroller General of
the United States.*

R. WALTON MOORE

Acting Secretary of State.

LESLIE C. GARNETT

*United States Attorney
District of Columbia.*

HARRY L. UNDERWOOD

*Assistant United States Attorney,
District of Columbia.*

R. L. GOLZÈ

*General Counsel,
General Accounting Office.*

ALBERT A. PETER

*Senior Attorney,
General Accounting Office.*

Attorneys for defendants.

DISTRICT OF COLUMBIA, ss:

I, Richard N. Elliott, on oath state that I have read the foregoing answers by me subscribed and know the contents thereof and that the matters therein set forth I verily
35 believe to be true.

R. N. ELLIOTT

Subscribed and sworn before me this 14th day of December, 1936.

WILLIAM H. LAWSON

(Notarial Seal)

Notary Public.

My com. expires April 30, 1938

DISTRICT OF COLUMBIA, ss:

I, R. Walton Moore, on oath state that I have read the foregoing answers by me subscribed and know the contents thereof and that the matters therein set forth I verily believe to be true.

R. WALTON MOORE

Subscribed and sworn before me this 14th day of December, 1936.

WM. McNEIR

(Notarial Seal)

Notary Public.

Defendant's Exhibit A.

Copy

Department of State

Washington

October 10, 1936.

In reply refer to
FA 123 B 831/235

The Acting Comptroller General of the United States,
Washington, D. C.

Sir:

Reference is made to your letter A-61967 of
36 August 6, 1936, enclosing copy of your decision
A-61967 of August 6, 1936, to the President of the
United States Civil Service Commission, regarding the
payment of a retirement annuity to William W. Brunsw-
wick, retired American Foreign Service officer, while re-
ceiving compensation from the Government for civilian
employment.

There is enclosed a copy of a communication of Septem-
ber 28, 1936, from Mr. Brunswick, in which the retired offi-
cer states that he is advised that the action of the Comp-
troller General is not authorized by law, and is contrary to
the Act under which he received the annuity, and that he
will take up the matter further in the near future.

A copy of Mr. Brunswick's letter is being sent to the
Civil Service Commission.

Very truly yours,

For the Secretary of State:

(Signed) WILBUR J. CARR
Assistant Secretary.

Enclosure:

From Mr. William W. Brunswick, of September 28, 1936.

Defendant's Exhibit B.

Copy

Washington, D. C.
September 28, 1936.The Honorable,
The Secretary of State,
Washington, D. C.

Sir:

I have to acknowledge receipt of the Department's instruction of August 14, 1936, which reached me upon my return to Washington early in September.

I have the honor to inform you that I am now employed in a minor capacity with the Resettlement Administration in emergency work of a temporary nature.

In reference to refund of annuity received while employed, I am advised that the action of the Comptroller General is not authorized by law, and is contrary to the Act under which I received the annuity. Under these circumstances I will in the near future take the matter up further.

Respectfully yours,

WILLIAM W. BRUNSWICK (Signed),
*Foreign Service Officer, Retired.*38 *Motion that Suit be Dismissed as to Defendant
R. Walton Moore Acting Secretary of State*

Filed October 13, 1937

* * *

Now comes Leslie C. Garnett, United States Attorney, attorney for defendant R. Walton Moore, Acting Secretary of State, and moves the Court to dismiss this suit as against R. Walton Moore, made a party defendant herein in his official capacity as Acting Secretary of State, on the following ground:

1. The said suit has abated as to said defendant Moore, he having been relieved as Acting Secretary of State on January 14, 1937, upon the return to duty on said date of Honorable Cordell Hull, Secretary of State, and the said

Secretary of State not having been substituted as a party defendant and the time for such substitution having long since expired.

LESLIE C. GARNETT

United States Attorney

H. L. UNDERWOOD

Assistant United States Attorney.

Attorneys for said Defendant.

Order Dismissing Suit as to the Defendant R. Walton Moore, Acting Secretary of State.

Filed October 13, 1937

* * *

On motion of the United States Attorney and it appearing that the defendant R. Walton Moore has ceased to act as Acting Secretary of State, the Honorable Cordell Hull, the Secretary of State, having returned to duty on January 14, 1937, and no substitution of said Cordell Hull as a party to this action having been made, and the time for substitution having expired, it is this 13 day of October, 1937,

39 ORDERED, ADJUDGED and DECREED that the said suit has abated as to said R. Walton Moore, named herein as Acting Secretary of State.

PEYTON GORDON

Justice

Memorandum Opinion

Filed December 17, 1937

* * *

This is a bill in equity for injunction.

Plaintiff was appointed in the Foreign Service of the United States as a deputy consul and clerk on April 24, 1907, at \$750.00 per annum. He was promoted at various intervals and on July 1, 1924, under the Act of May 24, 1924, which reorganized the Foreign Service, was appointed a Foreign Service officer at \$3500.00 per annum.

On August 31, 1932 plaintiff was retired for permanent disability under Sec. 26 (j) of the Act of February 23, 1931,

which amended the Foreign Service Act of 1924, with a retirement annuity of \$1623.12 per annum.

May 9, 1935 to June 30, 1935 plaintiff was employed as a correspondence dictator by the National Emergency Council, receiving \$315.00 for his services. This was a temporary position, not under Civil Service. On February 17, 1936 plaintiff became employed in a temporary position as a correspondence clerk in the Resettlement Administration, at a salary of \$1620.00 per annum, which position was not under Civil Service. Plaintiff held this position until August 3, 1936, when he was appointed Assistant Fiscal Accounting Clerk for emergency work in the Office of
40 the Commissioner of Accounts and Audits, at the same salary, this position not being under Civil Service.

Thereafter, on August 6, 1936 the defendant Acting Comptroller General ordered that plaintiff's annuity be stopped during the period of his employment and a demand was made upon plaintiff for the retired pay, aggregating \$973.88, received by him during his civilian employment.

This suit is against the Acting Comptroller General and the Acting Secretary of State, praying that the Acting Secretary of State, be ordered to pay plaintiff his accrued retirement allowance, and that the Acting Comptroller General be enjoined from prohibiting or interfering with such payment, and also be enjoined from collecting or attempting to collect the said sum of \$973.88.

The case has been abated as to the Acting Secretary of State for failure to substitute the Secretary of State as party defendant upon the latter's return to duty.

The precise question involved is whether a retired Foreign Service officer, receiving an annuity for disability, is entitled to receive, for the same period of time, both such retirement allowance and compensation for services as a civilian employee, in temporary positions of a different nature, in the Executive branch of the Government, not under the classified civil service.

Plaintiff herein was retired under the provisions of Sec. 26 of the Act of February 23, 1931, which reads in part as follows:

The President is authorized to prescribe rules and regulations for the establishment of a Foreign Service retire-

ment and disability system to be administered under the direction of the Secretary of State and in accordance with the following principles, to wit:

41 (j) Retirement for disability. That any Foreign Service officer who, before reaching the age of retirement becomes totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part, shall, upon his own application or upon order of the President, be retired on an annuity under paragraph (e) of this section: *Provided, however,* That in each case such disability shall be determined by the report of a duly qualified physician or surgeon designated by the Secretary of State to conduct the examination: *Provided further,* That unless the disability be permanent, a like examination shall be made annually in order to determine the degree of disability, and the payment of annuity shall cease from the date of the medical examination showing recovery.

Sec. 18 (m) of the Act of May 4, 1924 read as follows:

Reduction of annuity of retired Foreign Service officers accepting other employment.—Whenever any Foreign Service officer, after the date of his retirement, accepts a position of employment the emoluments of which are greater than the annuity received by him from the United States Government by virtue of his retirement under this section, the amount of the said annuity during the continuance of such employment shall be reduced by an equal amount: *Provided,* That all retired Foreign Service officers shall notify the Secretary of State once a year of any positions of employment accepted by them stating the amount of compensation received therefrom and whenever any such officer fails to so report it shall be the duty of the Secretary of State to order the payment of the annuity to be suspended until such report is received.

It will be noted that Sec. 18 (m) used the words "position of employment", without indicating whether employment in the United States Government or in private business was meant. The meaning is made clear, however, by a reference to Report No. 157 of the Committee on Foreign Affairs of the House of Representatives, 68th Cong., 1st Session, where (P. 4) it is said:

In addition to the general features of the retirement plan there are two special features which have been introduced . . . The other provides that when a retired officer accepts a position of *private employment* at a salary greater than his annuity from the Government, the annuity shall be reduced proportionately. This is intended to discourage the practice of retired officers drawing Government annuities while earning large salaries *in business*. (underscoring supplied)

42 Sec. 18 (m) was repealed by the Act of February 23, 1931 (46 Stat. 1211), thus leaving plaintiff, when he retired on August 31, 1932, free to accept as much compensation as he could command, in private employment. But neither Sec. 18 (m) nor the fact that it was repealed supports plaintiff's contention that he is entitled to receive concurrently his retirement annuity and compensation for services rendered in a civilian office under the Executive branch of the United States Government.

Plaintiff's counsel have cited no statute or case to the effect that a retired civilian employee of the Government, receiving a retirement annuity for disability, can be reemployed in Government service and draw concurrently the civilian retirement annuity and active compensation while so reemployed. The Comptroller General, in a long line of decisions, has ruled to the contrary.

The cases cited by plaintiff's counsel, involving retired Army and Navy officers, are inapplicable, as plaintiff herein is a retired civilian officer.

Plaintiff's alleged right to receive concurrently his retirement annuity and his active service compensation is not so clear and free from doubt that an injunction will lie to enforce it. Plaintiff has in the Court of Claims a forum in which he can establish his alleged right.

I find no statute or other authority giving the plaintiff the right to receive concurrently his retirement annuity and active service compensation, and therefore the injunctive relief prayed for is denied and the bill of complaint will be dismissed.

PEYTON GORDON

Justice

December 17, 1937

43 *Order Discharging Rule and Decree Dismissing Bill of Complaint*

Filed January 11, 1938

* * *

This cause came on to be heard at this term upon the Rule to Show Cause issued herein and upon Bill and Answer. Thereupon, upon consideration thereof, it is this 11th day of January 1938.

ADJUDGED, ORDERED and DECREED, That the Rule to Show Cause issued herein be and the same is hereby discharged.

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED, That the Bill of Complaint be and the same is hereby dismissed, with costs to the defendant, to be taxed by the clerk, and with leave to the defendant to have execution therefor as at law.

PEYTON GORDON

Justice

Exception noted to above.

From the foregoing decree the plaintiff notes an appeal in open Court to the U. S. Court of Appeals for the D. C.

The undertaking for costs is hereby fixed at \$100. with leave to deposit \$50. cash in lieu thereof.

PEYTON GORDON

Justice.

44

Memorandum

January 26, 1938

Bond (\$100) on appeal approved and filed.

Assignment of Errors

Filed March 15, 1938

* * *

Comes now the plaintiff in the above-entitled cause, and says:

First. That the Court erred in dismissing the Bill of Complaint herein by the plaintiff filed;

Second. That the Court erred in not granting the relief prayed for.

HUSTON THOMPSON
HERBERT S. WARD
Attorneys for Plaintiff

Designation of Record

Filed February 3, 1938

* * *

The Clerk will please prepare the record on appeal in the above-entitled cause, to contain the following:

- 1—Original Bill of Complaint and Exhibits
- 2—Rule to Show Cause
- 3—Joint answer of the defendants
- 4—Motion and Order to Dismiss, as to defendant R. Walton Moore
- 5—Memorandum findings of fact
- 6—Order discharging rule and decree dismissing
- 45 Bill of Complaint
- 7—Memorandum of filing of cost bond
- 8—Assignments of Error
- 9—Copy of this designation.

HUSTON THOMPSON
HERBERT S. WARD
Attorneys for Plaintiff

Counter Designation of Record

Filed February 7, 1938

* * *

Now comes Richard N. Elliott, Acting Comptroller General of the United States, defendant-appellee in the above entitled cause, by his attorneys and designates as part of the record to be included in the transcript in addition to those designated by the plaintiff, such part being deemed necessary and material for the appeal, namely:

1. Memorandum opinion by Justice Gordon filed December 17, 1937.
2. Copy of this Counter Designation.

DAVID A. PINE

Acting United States Attorney
District of Columbia

HARRY L. UNDERWOOD

Assistant United States Attorney
District of Columbia

R. L. GOLZÈ

General Counsel
General Accounting Office

ALBERT A. PETER

Senior Attorney
General Accounting Office

Attorneys for defendant-appellee

- 46 Service of copy of foregoing Counter Designation of Record is hereby acknowledged this 7th day of February, 1938.

HUSTON THOMPSON

HERBERT S. WARD

per E U MERRILL

Attorneys for plaintiff

-
- 47 In the District Court of the United States for
the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 46, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 63083 in Equity, wherein William W. Brunswick is Plaintiff and E. N. Elliott, Acting Comptroller General of the United States et al are

Defendants, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 18th day of March, 1938.

C E STEWART,

(Seal)

Clerk.

Endorsed on Cover: No. 7137. William W. Brunswick, Appellant, vs. R. N. Elliott, Acting Comptroller General &c. United States Court of Appeals for the District of Columbia Filed Mar 21 1938 Joseph W. Stewart, Clerk

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1938

No. 7137.

SPECIAL CALENDAR

WILLIAM W. BRUNSWICK, *Appellant*.

v.

THE UNITED STATES, *Appellee*.

BRIEF FOR APPELLANT.

HUSTON THOMSON,
Southern Building,
Washington, D. C.

HERBERT S. WARD,
Washington Building,
Washington, D. C.
Attorneys for Appellant.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1938

No. 7137.

SPECIAL CALENDAR.

WILLIAM W. BRUNSWICK, *Appellant*,

v.

THE UNITED STATES, *Appellee*.

BRIEF FOR APPELLANT.

STATEMENT OF FACT.

This is an appeal from a judgment of the District Court of the United States for the District of Columbia from a final decree entered by Mr. Justice Gordon on January 11, 1938, dismissing the Bill of Complaint.

The facts are that appellant was appointed Deputy Consul and Clerk in the Foreign Service on the 21st

day of April, 1907, at a salary of \$750.00 per annum. Thereafter he was advanced from one position to another until on or about July 1, 1924, he was appointed a Foreign Service officer with the title of Vice Consul at a salary of \$3,500.00 per annum.

On August 31, 1932 he was retired for physical disability under the provisions of Section 26 (j) of the Act of February 23, 1931 (reference hereafter) with retirement pay of \$1,623.12 per annum.

On May 9, 1935 appellant was employed by the National Emergency Council as a correspondence dictator for a temporary period ending June 30, 1935 at a daily wage of \$7.00, the total amounting to \$315.00. This position was not under the Civil Service of the United States. For the same period appellant received his retirement pay.

On Feb. 17, 1936 appellant was temporarily employed as a correspondence clerk in the Resettlement Administration, the position not being under Civil Service. His salary was \$1620. per annum and he held this position until the 3rd day of August, 1936, when he was appointed temporarily and for emergency work as assistant fiscal accounting clerk (E. O. 5) in the office of the Commissioner of Accounts and Audits, with a compensation at the rate of \$1620. per annum. This position was not under the Civil Service. Appellant at the same time drew his retirement pay at the rate of \$1623.12 per annum.

Appellant continued to draw his retirement pay until the Comptroller General ordered the Secretary of State to suspend further payment of the annuity and to demand a refund of the retirement pay received by appellant during the above periods amounting to \$973.88.

The Acting Secretary of State complied with appellee's order and appellant has not received his retire-

ment pay since September 1, 1936. He has not complied with the demand for the return of the said \$937.88 pending decision herein.

Appellant is still employed as the said assistant fiscal accounting clerk (E. O. 5) in the said temporary position with the Commissioner of Accounts and Audits, not under Civil Service, at a salary of \$1620. per annum.

The Bill herein was filed by appellant to prevent a multiplicity of suits, to recover the monthly retirement payments due him, to compel the appellee to withdraw prohibition of payment of appellant's retirement fund, and to prevent further action to collect the said \$973.88 paid to appellant.

QUESTION INVOLVED.

The question involved in this appeal is as follows:

If appellant, who is retired from the Foreign Service, on annual retirement pay of \$1623.12, takes a temporary position with the Federal Government and not under the Foreign Service, which position pays \$1620.00 per annum, can he be required by the Comptroller General of the United States to return his retirement pay already received while holding said temporary position, and be refused retirement pay during the time in which he continues in said temporary position?

ASSIGNMENTS OF ERROR.

The following assignments of error are relied upon (R. p. 37):

One, that the Court erred in dismissing the Bill of Complaint filed herein by appellant.

Two, that the Court erred in not granting the relief prayed for in the Bill of Complaint.

ARGUMENT.

Appellant's contention is that the Foreign Service employees have been set apart, by an Act of Congress, from any control by or jurisdiction under the Classified Civil Service of the United States; that the Act so creating the Foreign Service not only cut it off from the Civil Service but set up for it a control which in no way limits or prohibits a member of the Foreign Service upon retirement from taking a position with the Government outside the Foreign Service and receiving the pay of that position, while at the same time receiving retirement pay from the Foreign Service.

The Retirement Status of Government Employees Prior to the Year 1920.

The first Civil Service retirement Act was that of May 22, 1920, being "An Act for the retirement of employees in the classified Civil Service, and for other purposes," hereinafter called the *Civil Service Retirement Act* (United States Statutes at Large, Vol. 41, Part 1, Public Laws, page 616). Prior to the enactment of this Act there was no prohibition against any individual holding two offices in the Federal Government which were compatible.

The Supreme Court had held in *United States v. Saunders* (120 U. S. 126) that Sections 1763, 64 and 65 of the Revised Statutes prohibiting additional compensation to public officers did not apply to a person holding different offices. The statutes were silent, nor was there any court decision against a person receiving retirement pay and being employed by the Government in another department from which he was receiving an annuity, except that Sections 1222 and

1223 of the Revised Statutes "imply that a retired Army officer may at the same time hold any other office except in the consular and diplomatic service of the Government" (*Collins v. United States*, 15 Ct. Clms. 22).

In the Collins case, the Court said in part:

"Section 3 of the Act 1839 (Chapter 82, 5 Stat. L. 349), Section 2 of the Act August 23, 1842 (Chapter 183, 5 Stat. L. 510) and Section 12 of the Act August 26, 1842 (5 Stat. L. 525), all now incorporated in the Revised Statutes in Sections 1764 and 1765, have been understood as prohibiting only additional pay and extra allowances and compensation to public officers in the various forms there specified. They have not been supposed to apply to the salaries of different offices legitimately held by the same person."

The Civil Service Retirement Act of 1920.

In the Civil Service Retirement Act there was no limitation upon any person on retirement pay accepting a salary from a position for services, different in kind from his former service. Hence, any legislation after the passage of the Civil Service Retirement Act containing a limitation upon the rights of the individual would not create any new right. ✓

It should be noted that the Civil Service Retirement Act of 1920 in Section 2 placed appellant in the *classified Civil Service* and made him eligible for retirement on an annuity as provided in Sections 2 and 3 thereof. The Civil Service Retirement Act did not prohibit appellant when retired on an annuity from entering a *temporary position* in a *temporary division* of the Government and drawing salary therefrom without being reduced in his annuity.

The Necessity for the Separation of Foreign Service Employees from Conditions Under the Civil Service Retirement Act of 1920.

As this court well knows, employees of the State, Treasury and Interior Departments are under the classified Civil Service Act of 1920, as amended. Up until 1924 the Foreign Service employees of the State Department were included under the classified Civil Service Act. But the time came when it was apparent that these 700 employees should be separated from the classified Civil Service for reasons which were obvious to the Congress and to the then Secretary of State, the Honorable Charles Evans Hughes.

This group of persons were moved about in foreign countries during much of their official life. Those in the consular division, with the exception of a few months vacation, moved from one foreign country to another during their entire official life, and did not return to this country until they were retired. This was the experience of appellant. Thus in their official life they were unlike the other members of the Department of State or other departments who seldom, if ever, leave this country and are thus able to keep their home ties so that when they retire, if they have the physical and mental capacity, they can and often do get work in private positions.

Furthermore, the 700 officials who spend practically their entire life in foreign fields, unlike most members of the classified Civil Service who retire at 70, are retired at the age of 65 because it has been determined that beyond that age, like the Army and Navy officers, they will not be able to stand the rigors of cold climates or the fevers or heat of torrid climates. Yet like Army and Navy officers, they could easily continue to hold a

position in the temperate climate of the United States after retirement. This group of 700 who may be said to be our foreign legion in civil life, are subject to just as rigorous conditions as the soldier and sailor and generally have more continuous and unbroken details.

The court may take judicial notice that none of the consular officers are being permitted to return to the United States, or seeking to do so, except on vacation leave, from the wars that are going on in China and Spain. It may take judicial notice that when the Government of China has moved from one place to another the Foreign Service officer has gone along with that Government or stayed with it under fire. The Court may take notice of the risks these officials run in foreign countries, as for example, the recent murder of Theodore Marriner at Beirut, Syria. Because he is subject to such conditions the Foreign Service official retires five years earlier than the Civil Service officer and at about the same age as the Army and Navy official, and for like reasons. Moreover, like the Army and Navy officials he might be disabled for active Foreign Service and still hold positions in the United States in some other department of the Government in a temporary job such as appellant has been holding.

It was undoubtedly because both the body and mind of a person in the Foreign Service was required to withstand the unusual climatic conditions that the Revised Statutes, Sections 1222 and 1223, "imply that a retired Army officer may at the same time hold any other office except in the consular and diplomatic service of the Government." (Collins case, *supra*.) In other words, an individual could be retired from the Army and Navy and hold a Civil Service position in Washington or continental United States, but he could

not hold such a position in the consular service and be sent out into a foreign post because at his retired age he would not be able to stand such climatic conditions any more than a consul who had been compelled to resign because he had reached the age limit.

This Court seeing that the Foreign Service officers and officials are like the Army and Navy in respect to retirement, can readily understand the reasons for their separation from the Civil Service. If the reasons were not similar, why pass a separate special Act for this group setting them aside in a class by themselves, even apart from the rest of the State Department? Why set up a machinery separate and apart from the Civil Service, completely supervised and controlled outside of the Civil Service? Why have them retire at 65, five years earlier than the Civil Service employees?

The statement of former Secretary Hughes in Senate Report 532 (68th Congress, 1st session, page 7) accompanying the Act of May 24, 1924 (43 Stat. 144; U. S. C. A., Title 22, Sec. 21) supports this position. Secretary Hughes there said that there were a number of positions held in the consular service by officers *advanced in years* whose retention *impairs the efficiency of the service* as a whole and that there should be provision made for their retirement, and added specifically that they should be brought under provisions of the Civil Service, *modified as to age of retirement, the rate of contribution and the rate of the annuity*, and then recommended the setting up of the separate Foreign Service apart from the Civil Service.

What Secretary Hughes clearly saw was a group whose disability basis, age of retirement, and terms of the annuity, should be different from that of the Classified Civil Service at home.

The former Secretary said there was no difference in the principles governing the Foreign Service than those of the Civil Service. This is obvious for the principles and purposes of both Civil Service and Foreign Service are alike, to wit, to raise the standards of service, to protect the official or employee in his job from spoilsmen and on retirement from want. *But the application of the principles to these two services is not alike.* One belongs to the home guard; the other to the foreign legion who represent us and protect our business interests to the ends of the world. One keeps home ties. The other loses them. One can retire from the government and step into a private position without losing a day. The other away, from his native land for as much as forty years, returns out of touch with private business connections, practically cut off from any source of livelihood except his dreadfully meager annuity for which he has been assessed all those years, unless he can get a government position.

The Foreign Service Act of 1924.

The next legislation to consider is the Act of May 24, 1924, commonly known as the *Foreign Service Act*. This Act carved out of the Civil Service Retirement Act of 1920 a group that thereafter was not responsive to the classified Civil Service retirement law. It operated under rules and regulations entirely outside of the Civil Service. It had a department that regulated them under a statute entirely separate and in many respects dissimilar to the Civil Service Act of 1920, and its amendments, and from the provisions of the Acts governing the rest of the State Department.

The Act incorporated sub-paragraph (m) under Section 18, which in part reads as follows:

“Whenever any Foreign Service officer, after the date of his retirement, accepts a position of employment the emoluments of which are *greater than the annuity received by him from the United States Government* by virtue of his retirement under this Act, the amount of the said annuity during the continuance of such employment shall be reduced by an equal amount:” (Emphasis ours)

This paragraph was not in the Civil Service Act. In explanation of paragraph (m) Mr. Rogers, chairman of the Committee on Foreign Affairs of the House of Representatives (Report No. 157, 68th Congress, 1st session), said in the Committee Report accompanying the Bill in the House, as follows:

“In addition to the general features of the retirement plan there are two special features which have been introduced. One of these penalizes men who voluntarily resign by making only one-half of their contributions, without interest, returnable to them. *The other provides that when a retired officer accepts a position of private employment at a salary greater than his annuity from the Government, the annuity shall be reduced proportionately. This is intended to discourage the practice of retired officers drawing Government annuities while earning large salaries in business.*” (Emphasis ours)

Keeping in mind that this Foreign Service Act of 1924 was in no way included within the terms of the Civil Service Retirement Act but carved completely out of it and copied after the Army and Navy provisions for retirement, we have here the first limitation put upon members of this Foreign Service group or class who have been set aside from the Civil Service, to wit, that if upon retirement they accept a position of employ-

ment *with emoluments greater than their annuity*, they shall reduce their annuity accordingly. The Court will note the phrase "accepts a position of employment" and that the word "employment" is in no sense limited either to governmental or private business.

As the emoluments from appellant's positions have never been more than \$1620.00 a year and therefore less than his retirement allowance, he could not have been affected by the limitation in sub-paragraph (m). Therefore, if he had held the temporary positions, which he has since occupied, after the Foreign Service Act of 1924 was passed, he certainly should not have been deprived of the income from them, by reducing his annuity.

To recapitulate, there is (1) no prohibition or limitation upon a person like appellant accepting an annuity under the Civil Service Retirement Act of 1920 or previous thereto and at the same time taking another but temporary position in the Government wholly unlike his previous position and accepting a salary therefrom; (2) In 1924 Congress set up a new group or class called the Foreign Service because the duties of this group were dissimilar to those of Civil Service employees; (3) This new class was separately controlled under an Act similar to legislation governing the Army and Navy, because the Foreign Service was subject to requirements as difficult and rigorous or more so than those of the Army and Navy; (4) By this legislation appellant passed from the Civil Service control and was enrolled under this new Foreign Service Act; (5) The Foreign Service Act for the first time placed a limitation upon the receipt of an annuity where the Foreign Service officer was employed either in the Government or private employment at a salary greater

than the annuity; (6) This limitation did not apply to appellant because his salary from the temporary employment did not amount to his annuity.

The Act of February 23, 1931, Amending the Foreign Service Act.

It is most significant that the Act of February 23, 1931 (1146 Stat. 1211, U. S. C. A. Title 22, Section 26) amending the Foreign Service Act of May 24, 1924, omits sub-paragraph (m) of Section 18 of the Foreign Service Act, limiting a Foreign Service officer when employed during retirement outside of the Foreign Service from accepting any amount from this employment that would exceed his annuity.

Section 28 of the Foreign Service Amending Act of 1931 also repeals all provisions inconsistent with the Foreign Service Act enacted in 1924, and further provides that the provisions of the said law not repealed are to continue to be applicable to the Foreign Service officers.

In explanation of the failure to re-incorporate in the Foreign Service Amending Act sub-paragraph (m) of Section 18 of the Foreign Service Act of 1924, the Conference Report (No. 2702, House of Representatives 71st Congress, 3rd session) accompanying the Bill in its passage through the House and Senate carried this explanation:

“And (e) elimination of the present provision of law (m) would prevent retired officers from obtaining employment with salaries in excess of their annuities *which is a particular hardship upon retired officers with low annuities.*” (Emphasis ours)

In the Court below counsel for appellee appeared greatly disturbed because appellant referred to the

Conference Report attached to the Foreign Service Amending Act of 1931 in both the House and the Senate which explained why in 1931 the Conference Committees of the House and Senate recommended the repeal of sub-paragraph (m). Appellee asserted that there was no ambiguity in the Act of 1924 or the Act of 1931. Hence there was no need to introduce a Conference Report to explain the reason for the repeal.

When, however, the Foreign Service Act of 1924 was passed and had incorporated in it sub-paragraph (m) of Section 18, the Committees in Congress having this Bill in charge sought to explain why the said sub-paragraph (m) was incorporated since it was the first time a limitation had been placed on an annuity. The House Committee Report on page 4 stated that the limitation was being put upon the annuities of retired Foreign Service officers so as "to discourage the practice of retired officers drawing Government annuities *while earning large salaries in business.*"

These limitations would not have affected appellant in any case for he did not go into private "*business*" and his salary was never equal to his annuity. What appellant did as an annuitant was to get a temporary position in a temporary division of the Government, not under Civil Service, on a salary less than his annuity.

Congress did not realize that in putting the said limitation upon a Foreign Service officer in 1924 it was not only restricting those who might go out and get "large salaries" in private *business*, but it was also restricting those who had had very small salaries in the Foreign Service, retired on a very small annuity, and with no other means of support, from subsequently trying to eke out an existence by getting a very small position either in private business or with the Govern-

ment in some department other than the one they had served in.

After seven years trial of this limitation, from 1924 to 1931, having realized the burden it had put upon poor men in the consular service with very small annuities and no other means of livelihood, Congress determined to wipe out this limitation. So both Houses voted upon and followed the recommendation of the Conference Committee attached to the Bill because the limitation was a "*particular hardship upon retired officers with low annuities.*"

Counsel for appellant submit that the two explanations of the Committees of Congress, one being the reason for including a limitation upon the retired pay of a Foreign Service officer in the Act of 1924 and attached to that Bill, and the other repealing that limitation in the Act of 1931 and attached to it, are in no sense in conflict with either or both of the Acts. They are a simple clear explanation of what was in the mind of Congress when it voted first to put on the limitation and later to take it off. Therefore, the quotation from Supreme Court decisions by appellee in its brief in the lower Court holding that reference will not be had to a Committee Report except where there is an ambiguity, is totally irrelevant to the instant case.

Undoubtedly the reason that the Conference Committee thought it necessary to make an explanation along with the repealing clause in 1931 was because sub-paragraph (m) had not been re-stated in the Act of 1931 and was not on its face in conflict with the repealing paragraph of the Act of 1931 and the repealing paragraph had said that all parts of the Act of 1924 not inconsistent with the Act of 1931 were to continue to be applicable to the Foreign Service officers.

Let us carry appellee's argument to its logical and ultimate conclusion. If, as it says, it means that one on an annuity of \$1623.12 could not in the Foreign Service take any position with the Government except he surrender all or a part of his annuity, then an educated married man with a wife, dependant on him, would be limited and penalized to a point of desperation with practically all doors closed since perhaps for thirty years he would have had no business ties at home and it would, therefore, be very difficult for him to get a position in private business. Such an unfair idea was unthinkable to Congress and when it discovered what it had done it repealed the limitation.

The Accounting Officers Have Never Prior to the Instant Case Rendered a Decision that One on an Annuity Could Not Receive Pay for Services in a Department Other than that to Which the Annuitant Had Been Connected.

Appellee in the Court below in support of its position referred to three classes of cases and certain legislation, none of which apply to the instant case. These classes are as follows:

1. Where a person is on retirement pay and is ordered back into the service for *re-employment*.
2. Where a person attempts to draw two retirement pays at the same time.
3. Where a person is forbidden to hold two positions of a like character with the Government and draw pay from both at the same time.

That there may be no question about the dissimilarity of these cases to the instant case a further de-

tailed reference is here made of those relied upon by appellee in the Court below.

The decision of the Comptroller of the Treasury in a lighthouse re-employment case in 27 Comp. Dec. 524 says in the syllabus that:

“*Re-employment* in Government service of employees retired under provisions of the Act of May 22, 1920, 41 Stat. 614, is prohibited.”

If the Court will have reference to Exhibit A which is a letter from the Acting Comptroller General to the President of the Civil Service dated August 6, 1936, and attached to appellant's Bill (10 Comp. Gen. 309, Record 12) it will find that a like case having to do with the Lighthouse Retirement Act of June 20, 1918 is cited by the Comptroller as authority for stopping plaintiff's annuity. The facts were in both cases that the persons having reached the age of retirement of 65 years and having served 30 years could be *re-instated or re-employed* at any time prior to the compulsory retirement age of 70 years *only upon relinquishing their retired status and retired pay*. This is a sample of the *re-employment* cases referred to by appellee. It belongs to the first class of cases heretofore described.

In the case of *Pate v. United States*, 78 Ct. Clms 395, a party sought pay as a retired enlisted man of the regular Army and also as a retired emergency officer of the World War. The Court denied his right to take the two retirement pays at the same time and said, “The policy of the Government has always been against double pensions and compensations.”

Appellant is not seeking two pensions, nor two compensations. Appellant has an annuity and is employed

in a temporary office of a temporary division of the Government *not under Civil Service or Executive Civil Service*, whatever the latter may be.

Appellant now owes no service to the Government since he not only earned his retirement pay by service but a part of the retirement pay was taken out of his own salary. "*As a matter of fact the pay of a retired officer is not compensation.*" (*Geddes v. United States*, 38 Ct. Clms. 428.)

Hines v. United States, 39 Fed. (2) 517, is a case which held that two retired pays or compensations are not allowable at the same time.

In *United States Ex Rel Bowling v. Hines*, 50 Fed(2) 330, it was held that a veteran could not collect both pay of a retired enlisted man and of a retired emergency officer at the same time.

In this connection appellee has admitted (Rec. 12) that there is nothing in the Foreign Service Act to prevent appellant while on an annuity being employed in a position not incompatible. Appellee, however, asserts that if appellant is *re-employed* in the so-called (by appellee) Executive Civil Service his annuity must be suspended.

It ought to be clear to the ordinary reader that the word "*re-employment*" means *re-employment* in the service from which one has retired. In the instant case there has been no such re-employment.

Appellant has never been placed on any temporary roll under the so-called Executive Civil Service. He has never been required to fill out a Civil Service application and has not done so. Appellant has not been able to find in legislative enactment the words "*Executive Civil Service.*" If there is an Executive Civil Service he does not belong to it.

There is no way by which appellant could ask for and be granted the right from his position to go on the permanent Civil Service rolls and that is one test.

Appellee below referred to, and quoted from, the Act of July 31, 1894, 26 Stat. 205, Section 2, having reference to a person who holds an office having a salary or *annual compensation*, and again, to the case of *Pack v. United States*, 41 Ct. Clms. 414, which discusses the right to dual compensation. As we have already pointed out, there is no claim made here in support of dual compensation. It is interesting to note, however, that this case makes the dual compensation limitation apply only to those with a salary of \$2500 or upwards. This, of course, means that a person with a salary under \$2500 would be excused from the limitation of holding "two distinct offices" and drawing separate salaries. It would also indicate beyond a peradventure that what Congress was seeking to do was to put a limitation upon persons on salaries in the higher brackets and to excuse from the limitation those on low salaries under \$2500. It is the same thought that runs through the aforesaid legislation of 1924 covering the Foreign Service.

Appellee below also refers to the Act of May 10, 1916, 39 Stat. 120, as amended Aug. 29, 1916, 39 Stat. 582. There also the limitation is put upon one person receiving *more than one salary* from the Government at the same time where the two salaries exceed "the sum of \$2,000 per annum." The statute, passed before the Foreign Service was created, says, in addition, that it shall not apply to retired officers or enlisted men of the Army, Navy, Marine Corps or Coast Guard, or enlisted men of the militia and naval militia. It again points the way to the protection of men with lower

salaries as Congress so clearly indicated in its legislation.

Appellee referred below to the Act of June 16, 1921, 42 Stat. 41, which permits clerks, etc. of the United States District Courts to receive compensation from two positions where the aggregate amount does not exceed \$2,000. Appellee quoted from the Act of June 30, 1932, 47 Stat. 406, which forbids retirement pay to an Army officer where the combined amount of annual pay and the retired pay exceeded \$3,000. When such is the case one cannot take above the sum of \$3,000 from the two sources.

Appellee concludes that all these cases and statutes show that the policy of Congress is to restrict dual compensation. We might add that these cases show that the policy of Congress is to restrict dual compensation under the *Civil Service* when the sum of the two *compensations is above* a certain amount. But none of the foregoing cases overcome Appellants claim for here we have in 1931 Congress deliberately repealing any limitation put upon the retirement pay of a Foreign Service officer regardless of the sum total of the retirement pay plus the pay from another source.

Appellee referred to Section 27 of the Amending Foreign Service Retirement Act of 1931 which says that

“In the event of public emergency *any retired Foreign Service Officer* may be recalled temporarily to active service by the President and while so serving he shall be entitled in lieu of his retirement allowance to the full pay of the class in which he is temporarily serving.”

If appellant under this section were recalled by the Foreign Service to active duty to perform services in

the city of Washington, for example, he would, receive his active service pay and his retirement pay would stop and would not return to him until he ceased active service. But of course that is not the case here.

Memorandum Opinion of Mr. Justice Gordon.

Mr. Justice Gordon (Record 35) interprets Section 18 (m) of the Foreign Service Act of 1924 to apply to private employment at a salary greater than that of the annuitant from the Government. The Court observes (Record 36) that this section was repealed by the Act of 1931 "thus leaving the plaintiff where he retired on August 31, 1932, free to accept such compensation as he could command in private employment." There is nothing in this statement that would prohibit the employment of appellant by the Government and his receiving payment therefor while receiving his annuity.

The Court, however, relies upon the fact that no statute or case has been cited to the effect that a retired civilian annuitant can be re-employed in the Government service and draw concurrently the civilian retirement annuity and active compensation while so re-employed. Why should there be such a statute or case? If there was no such statute, and there is none, it would obviously mean that Congress did not intend that there should be any limitation, and, if there was no limitation it follows that no cases could arise.

In view of the Court's statement it is again respectfully submitted that this appellant was not *re-employed* in the Foreign Service.

The Court's statement indicates a case of first impression, and a substantial doubt as to the correctness of his conclusions when he said (Record 36):

“Plaintiff’s alleged right to receive concurrently his retirement annuity and his active service compensation is not so clear and free from doubt that an injunction would lie to enforce it. Plaintiff has in the Court of Claims a form in which he can establish his alleged right.”

Upon the foregoing statement the Court denied the injunctive relief prayed for and dismissed the Bill of Complaint.

If the Court’s advice were followed it would undoubtedly mean, in the event that appellant were successful in its suit in the Court of Claims for the recovery of annuity, repeated law suits. In the case of *McCabe v. United States*, decided December 7, 1936, the Court of Claims said in dismissing the refusal of the Accounting Officers to allow McCabe, a retired Army officer, lawful traveling expenses, that

“This question has repeatedly in previous cases been decided in favor of the plaintiff * * *. There is no reason why the plaintiff should have been put to the expense of bringing suit to recover what is unquestionably due him except the arbitrary action of the General Accounting Office in refusing to follow the law as it has been announced by the court in previous decisions.”

CONCLUSION.

It is respectfully submitted that what Congress and the courts have refused to do the Comptroller General by his decision in this case has sought to accomplish through an administrative order. Appellant, there-

fore, asks that the decision of the lower court be overruled and the Prayer in the Bill of Complaint (Rec. 9) be granted.

Respectfully submitted,

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FILED SEP 23 1938

Joseph W. Stewart
CLERK

No. 7137

**In the United States Court of Appeals for
the District of Columbia**

JANUARY TERM, 1938

WILLIAM W. BRUNSWICK, APPELLANT

v.

**R. N. ELLIOTT, ACTING COMPTROLLER GENERAL OF
THE UNITED STATES, APPELLEE**

BRIEF FOR APPELLEE

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In the United States Court of Appeals for the District of Columbia

JANUARY TERM, 1938

No. 7137

Special Calendar

WILLIAM W. BRUNSWICK, APPELLANT

v.

R. N. ELLIOTT, ACTING COMPTROLLER GENERAL OF
THE UNITED STATES, APPELLEE

BRIEF FOR APPELLEE

PRELIMINARY STATEMENT—PURPOSE OF THE ACTION

The appellant here was retired in 1932 from the Foreign Service of the State Department on account of his having become totally disabled for useful and efficient service by reason of "disease or injury." He thereupon became entitled to and received civilian retirement annuity under the provisions of the act of February 23, 1931, 46 Stat. 1207 (appendix, page 47). Thereafter, he was employed temporarily by the National Emergency

Council (May 9 to June 30, 1935), the Resettlement Administration (February 17 to August 3, 1936), and the Treasury Department, Office of the Commissioner of Accounts and Deposits (August 3, 1936, to present time).

When the matter of this subsequent employment was brought to the attention of the Acting Comptroller General of the United States he ruled that appellant was not entitled to retirement annuity while employed and receiving active compensation in a Government position. Pursuant to the Acting Comptroller General's advice, demand was made by the Secretary of State on appellant for refund of the retirement annuity payments which were received by him while he was also in receipt of active compensation during his employment in a Government position, and further payments of retirement annuity were suspended so long as he was so employed and in receipt of active compensation from the Government.

Appellant asserts he is entitled to both retirement annuity and salary under the employment and seeks by this suit in mandatory injunction to have the court review the action of the Acting Comptroller General of the United States and to coerce him to action contrary to that taken by him in a matter involving judgment and discretion.

STATEMENT OF THE CASE

On July 22, 1936, the President, Civil Service Commission, after reporting the appellant's service record in the State Department and his retire-

ment therefrom, and subsequent reemployment in the Government Service, requested a decision of the Acting Comptroller General of the United States upon two questions, viz:

1. May a Foreign Service Officer of the State Department, retired for reasons other than having reached automatic retirement age, be reemployed in the executive civil service?

2. If your answer to the foregoing question is in the affirmative, may both civilian compensation and retirement annuity be paid over the same period of time? (Plaintiff's Exhibit A, R. 10-13.)

The Acting Comptroller General of the United States, under date of August 6, 1936, 16 Comp. Gen. 121, replied to the foregoing questions in pertinent part, as follows:

Answering your question specifically you are advised that there is no prohibition of law against the reemployment in the executive civil service of a former foreign service officer—who has not attained the age for automatic retirement—retired for disability, but his retirement annuity may not be paid concurrently for the period of such employment (R. 13).

By letter of the same date, the Acting Comptroller General of the United States forwarded a copy of his decision to the Secretary of State and advised the latter, in pertinent part, as follows:

* * * In accordance with the decision of today, and the authorities therein cited,

his [the appellant's] annuity should be immediately suspended and the annuitant requested to refund all annuity received for the period of his civilian employment with the National Emergency Council and the Resettlement Administration. * * * (Plaintiff's Exhibit B, R. 13, 14.)

Thereupon the Acting Secretary of State informed appellant that it was the duty of the State Department "to comply with the law as construed by the Comptroller General" and therefore suspended further payments of retired annuity to the appellant for such time as he continued to receive active compensation from the Government for civilian employment therein, and requested him to refund the sum of \$973.88, which was the amount of annuity paid to him while he was in receipt, also, of active service compensation from the Government. (Plaintiff's Exhibit D, R. 15, 16).

Thereafter the State Department transmitted to the Acting Comptroller General of the United States a copy of appellant's letter dated September 28, 1936, to the Secretary of State, wherein the appellant stated in pertinent part:

In reference to refund of annuity received while employed, I am advised that the action of the Comptroller General is not authorized by law, and is contrary to the Act under which I received the annuity. Under these circumstances I will in the near future take the matter up further. (Defendant's Exhibits A and B, R. 31, 32.)

In view of the position taken by the appellant in the matter, the General Accounting Office¹ certified the appellant to be indebted to the United States in the sum of \$973.88. (Plaintiff's Exhibit E, R. 16, 17.)

On November 30, 1936, the appellant filed a Bill of Complaint in the court below against R. N. Elliott, Acting Comptroller General of the United States, and R. Walton Moore, Acting Secretary of State (R. 1-10), praying that the Acting Secretary of State be ordered to pay the appellant here his accrued retirement annuity and that the Acting Comptroller General of the United States be enjoined from prohibiting or interfering with such payment and from collecting or attempting to collect the sum of \$973.88.²

The case was heard on Bill and Answer and thereafter the court filed a memorandum opinion (R. 33-36), and on January 11, 1938, an order discharging the Rule and a Decree dismissing the Bill of Complaint was entered (R. 37). The appeal is from that Decree.

¹ Pursuant to the provisions of section 4 of the act of July 31, 1894, 28 Stat. 206, as amended by section 304 of the act of June 10, 1921, 42 Stat. 24, and the provisions of section 236, Revised Statutes, as amended by section 305 of the act of June 10, 1921, 42 Stat. 24.

² The court will note from paragraph 12 of the Joint Answer (R. 23) that the appellant, prior to this action, had initiated proceedings in Law Cause No. 88171 for a writ of mandamus in this particular matter, which case was dismissed at the request of appellant.

Upon motion of defense counsel the case was ordered abated as to the Acting Secretary of State for failure to substitute the Secretary of State as a party defendant within the time permitted by statute (R. 32, 33).

QUESTION INVOLVED

The question involved in this appeal is not that as stated on page 3 of appellant's brief but is more clearly, as follows:

Was subsection (m) of section 18 of the act of May 24, 1924, 43 Stat. 140, 145 (which authorized within prescribed limitations the concurrent receipt of retired annuity and civilian compensation from the Government) repealed by the act of February 23, 1931, 46 Stat. 1207?

If so, was the decision of the Acting Comptroller General of the United States that in the absence of a statute so providing the appellant here could not lawfully be paid concurrently retired annuity and active service compensation from the Government for civilian employment so clearly wrong that it may be revised or set aside in this proceeding?

THE STATUTES AND EXECUTIVE ORDERS INVOLVED

The statutes and executive orders deemed pertinent in the consideration of the case are set forth in the Appendix, pages 43-64.

ARGUMENT

I

Subsection (m) of section 18 of the act of May 24, 1924, 43 Stat. 140, 145, has no application to appellant's claim

The appellant here was retired from the Foreign Service of the State Department on August 31, 1932, under the provisions of subsection (j) of section 26 of the act of February 23, 1931, 46 Stat. 1212 (Appendix, page 48), on account of his having become "totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part," the pertinent provisions of said section of the statute being as follows:

That any Foreign Service officer who, before reaching the age of retirement becomes totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part, shall, upon his own application or upon order of the President, be retired on an annuity under paragraph (e) of this section: * * *

The appellant predicated his right of action solely upon the provisions of subsection (m) of section 18 of the act of May 24, 1924, 43 Stat. 140, 145 (Appendix, page 45), contending that that

subsection, though omitted in a later act, act of February 23, 1931, 46 Stat. 1207 (Appendix, page 47), was saved by the provisions of section 28 of that latter act. See paragraphs 5 and 6 of the Bill of Complaint (R. 3, 4).

Subsection (m) of section 18 of the act of May 24, 1924, 43 Stat. 140, 145, provides as follows:

(m) Whenever any Foreign Service officer, after the date of his retirement, accepts a position of employment, the emolument of which are greater than the annuity received by him from the United States Government by virtue of his retirement under this Act, the amount of the said annuity during the continuance of such employment shall be reduced by an equal amount: *Provided*, That all retired Foreign Service officers shall notify the Secretary of State once a year of any positions of employment accepted by them stating the amount of compensation received therefrom, and whenever any such officer fails to so report it shall be the duty of the Secretary of State to order the payment of the annuity to be suspended until such report is received.

But since the appellant was retired in 1932, and since the appellant in his Bill of Complaint predicated his cause of action upon the provisions of subsection (m) of the 1924 act, *supra*, there is for consideration now the question whether said subsection (m) of the 1924 statute was in effect at time appellant retired in 1932.

In connection with this question it is particularly significant to note section 7 of the act of February 23, 1931 (Appendix, page 47), reading as follows:

SEC. 7. That the Act (Public Numbered 135, Sixty-eighth Congress) approved May 24, 1924, entitled "An Act for the reorganization and improvement of the Foreign Service of the United States, and for other purposes," *be and the same is hereby, amended to read as follows:* (Emphasis supplied.)

The said act then proceeds to reenact, amend, and omit certain of the provisions of the 1924 act. Section 18 of the 1924 act embodying the entire retirement provisions becomes section 26 of the 1931 act. Subsection (j) of section 18 of the former act relating to retirement of a Foreign Service officer becoming "totally disabled for useful and efficient service by reason of disease or injury," (Appendix, page 44), is reenacted *verbatim et literatim* as subsection (j) of section 26 of the latter act (Appendix, page 48). Many of the other subsections of section 26 of the latter act are substantially similar with those of section 18 of the former act. However, it is significantly important to note that subsection (m) of section 18 of the 1924 act was omitted in the corresponding section 26 of the 1931 act. What is the effect of such omission?

The position of appellee is that subsection (m) of section 18 of the act of May 24, 1924, which was omitted from the amendatory act of February 23,

1931, became abrogated thereby and was thereafter no part of the statute. Therefore, there was no authority for the payment of retired pay to a Foreign Service officer thereafter retired on account of a total disability pursuant to the provisions of subsection (j) of section 26 of the act of February 23, 1931, during such time as such retired Foreign Service officer should be in receipt of emoluments for services rendered the United States Government through his acceptance of a position therein. (Paragraphs 5 and 19 (a) of Joint Answer, R. 19, 27.)

That the omission of a portion of an original statute in an amendatory act effects a repeal of the portion so omitted is well established.

Where an amendment is made by declaring that the original statute "shall be amended so as to read as follows," retaining part of the original statute and incorporating therein new provisions * * * all such portions of the original statute as are omitted from the amendatory act are abrogated thereby and are thereafter no part of the statute. (Section 168, Black on Interpretation of Laws, Second Edition. Compare sections 237 and 246, Vol. I, Lewis' Sutherland Statutory Construction, Second Edition.)

To the same effect are:

United States v. Tynen, 11 Wall. 88, 92; *United States ex rel. Brion v. Prentis*, 182 Fed. 894, affirmed 192 Fed. 117, certiorari denied 223 U. S. 723;

United States v. One Ice Box et al., 37 Fed. (2) 120; *Continental Ins. Co. et al. v. Simpson*, 8 Fed. (2) 439; *State ex rel. Nagle v. Leader Co.*, 37 P. (2nd) 561; *State ex rel. Nicely v. Wildon*, 197 NE. 844.

While subsection (m) of section 18 of the 1924 act was incorporated in the 1926 Edition of the United States Code it is significant to note the fact that the compilers of the 1934 Edition of the United States Code omitted therefrom said subsection (m) of section 18 of the 1924 act, indicating that the compilers themselves considered said subsection to have been repealed by the 1931 act. 22 U. S. C. 21.

Furthermore, section 26 of the amendatory act of February 23, 1931, 46 Stat. 1211 (Appendix, page 47), which section embodies the entire retirement provisions applicable to Foreign Service officers, begins by saying:

The President is authorized to prescribe rules and regulations for the establishment of a Foreign Service retirement and disability system to be administered under the direction of the Secretary of State and in accordance with the following principles, to wit:

Identical language appeared in section 18 of the 1924 Act, which section likewise embodied the entire retirement provisions applicable at that time to Foreign Service officers.

It is pertinent to note that while Executive Order No. 4255, dated June 18, 1925 (Appendix, page 56),

issued pursuant to the 1924 statute contained provisions for "Employment after retirement" within the limits prescribed by subsection (m) of section 18 of the 1924 act, no such or similar provision was contained in Executive Order No. 5642, dated June 8, 1931 (Appendix, page 60), issued pursuant to the 1931 statute to carry into effect the retirement provisions of the 1931 act, at the heading of which latter Order is found the following pertinent statement:

(1) These rules and regulations shall constitute the regulations of the Department of State for the administration of the Foreign Service under the provisions of the Act of February 23, 1931 (46 Stat. 1212). * * *.

The fact that the Executive order issued under the 1931 statute contained no provisions for *employment after retirement* likewise supports the conclusion reached by the Acting Comptroller General of the United States that subsection (m) of section 18 of the 1924 Act was repealed by the 1931 Act.

II

Subsection (m) of section 18 of the act of May 24, 1924, 43 Stat. 144, omitted in the amendatory act of February 23, 1931, 46 Stat. 1207, was not saved by any provisions in the latter act

Appellant in the Bill of Complaint, paragraphs 5 and 6 thereof (R. 3), seeks to avoid the application of the rule of statutory construction regarding parts of basic statutes omitted from amenda-

tory acts, by invoking the provisions of section 28 of the act of February 23, 1931, 46 Stat. 1213, as follows:

SEC. 28. That all provisions of law heretofore enacted relating to diplomatic secretaries and to consular officers, which are not inconsistent with the provisions of this Act, are hereby made applicable to Foreign Service officers when they are designated for service as diplomatic or consular officers, and that all Acts or parts of Acts inconsistent with this Act are hereby repealed.

The position of appellee in respect of that contention is that the statutory provisions just quoted could not, under any statutory construction, be construed as saving a particular provision of a prior act intentionally omitted in the later act.

Section 28, *supra*, is similar to the usual saving clauses which appear in amendatory statutes which proceed to reenact part of the original statute, incorporate new provisions, and change parts of the old statute—as is the situation here. The office of the saving clause here—section 28, *supra*—is merely to save rights which may have vested under the prior statute—the 1924 statute, as amended, having changed the names of positions, having set up a new classification of officers, etc. Since the appellant here retired in 1932—subsequent to the amendatory act of 1931, which omitted the provisions of subsection (m) of section 18 of the 1924 act under which the appellant attempted in his

Bill of Complaint to establish a right—he could have no vested rights by virtue of said subsection (m), hence, nothing saved by section 28, *supra*.

Furthermore, there is for noting, too, the fact that section 28 of the 1931 act refers to “all provisions of law heretofore enacted relating to diplomatic secretaries and to consular officers.” The appellant here was retired while serving as a Foreign Service officer in 1932 and not while serving as a diplomatic secretary or consular officer—such classification of officers having been changed by the act of May 24, 1924, 43 Stat. 140. Hence, such provisions of section 28 of the statute could have no relationship with his rights to retirement in 1932.

Then, too, the provisions of section 28, *supra*, are practically identical with the provisions of section 20 of the act of May 24, 1924, 43 Stat. 146, and the provisions of section 28 of the 1931 act would appear to have no greater force than the provisions of section 20 of the 1924 act. The right to retirement being granted for the first time by the 1924 act, the saving clause in the said 1924 act (section 20) could save nothing with reference to any retirement rights, for there were none prior thereto, and section 28 of the 1931 act being in substantially identical terms with section 20 of the 1924 act could have no greater force, for the right to appellant's retirement arose in 1932, subsequent to the amendatory act which contains section 28, *supra*.

The foregoing establishes that the court was correct when it held in memorandum opinion of December 17, 1937 (R. 33, 36), that:

Sec. 18 (m) was repealed by the Act of February 23, 1931 (46 Stat. 1211), thus leaving plaintiff, when he retired on August 31, 1932, free to accept as much compensation as he could command, *in private employment*. But neither Sec. 18 (m) nor the fact that it was repealed supports plaintiff's contention that he is entitled to receive concurrently his retirement annuity and compensation for services rendered in a civilian office under the *Executive branch of the United States Government*. [Italics supplied.]

III

Purpose of subsection (m) of section 18 of the act of May 24, 1924, and the effect of repeal of said subsection (m) by the act of February 23, 1931

With respect to the retirement provisions of the 1924 act the following statement is contained at foot of page 4 of Senate Report No. 532, 68th Congress, First Session:

In addition to the general features of the retirement plan there are two special features which have been introduced. One of these penalizes men who voluntarily resign by making only one-half of their contributions without interest, returnable to them. *The other provides that when a retired officer accepts a position of private employ-*

ment at a salary greater than his annuity from the Government, the annuity shall be reduced proportionately. This is intended to discourage the practice of retired officers drawing Government annuities while earning large salaries in business. [Italics supplied.]

The particular feature in question here related to the limitation provision contained in subsection (m) of section 18 of the 1924 act. Said limitation provision was directed to "a position of employment."

By liberal construction it is conceded that if subsection (m) of section 18 of the 1924 act was in effect when appellant retired in 1932, the concurrent receipt by the appellant of retired annuity and active civilian compensation while employed in the service of the Government in the amounts stated herein would have been authorized. When subsection (m) of section 18 of the 1924 act was repealed the appellant was still "free to accept as much compensation as he could command, in private employment," but there was not then any obstacle to the application of the long established principle that payment of retirement annuity at the same time the annuitant is drawing pay for active civilian service is wholly inconsistent with the basic purpose underlying civil retirement legislation. The repeal constituted no authority for appellant "to receive concurrently his retirement annuity and compensation for services rendered in a civilian

office under the Executive branch of the United States Government.”

IV

Appellant has deserted the grounds of action stated in the Bill of Complaint

That appellant's cause of action is based upon subsection (m) of section 18 of the act of May 24, 1924, 43 Stat. 145 (Appendix, page 45), is established by paragraph 6 of the Bill of Complaint (R. 3, 4);

6. Wherefore your petitioner is advised and believes, and so believing avers that the said Act of February 23, 1931, while it amends certain other provisions of the Act of May 24, 1924, in nowise alters, changes or amends sub-paragraph (j) or (m) of the said Act of May 24, 1924, and that *by virtue of the said Acts* the Congress of the United States has provided that a Foreign Service officer who has been retired under the provisions of sub-paragraph (j) *supra* shall receive the annuity pay fixed by paragraph (e) of the said Act *and may under the provisions of sub-paragraph (m) supra accept a position or office of employment to which emoluments are attached and may realize and enjoy the emoluments thereof* without diminution of his retirement pay, *unless the said emoluments of the said office so accepted are in excess of the retirement pay* received by the said retired officer. (Emphasis supplied.)

Therefore, if subsection (m) of section 18 of the 1924 act upon which the action below was predicated was repealed by the amendatory act of February 23, 1931, it would seem unnecessary to have to consider other grounds.

However, in appellant's brief it is no longer urged that the alleged rights of the appellant to concurrent receipt of retired annuity and civilian compensation while actively employed in an Executive Department or independent agency of the Government springs "by virtue of" the provisions of subsection (m) of section 18 of the 1924 act. On the contrary, much of the brief filed by the appellant's counsel is devoted to a showing of the reason why a retirement act was enacted for the Foreign Service of the United States separate and apart from the Civil Service Retirement Act of May 22, 1920, 41 Stat. 614, as amended. There is particular emphasis as to why it is thought the principles of the civil retirement act of 1920 are not applicable to Foreign Service employees, and an attempt to draw an analogy between the status of retired Foreign Service officers and retired *military* officers.

As a matter of fact appellant admits on page 19 of his brief that the Congress deliberately repealed any limitation upon the retirement pay of a Foreign Service officer—the limitation having reference solely to subsection (m) of section 18 of the 1924 act. Considering the ground of action relied on, any argument of the case upon other grounds

as covered in most part in appellant's brief would seem unnecessary. While appellee is reluctant to burden this Court with a discussion of matters (such as dual compensation, rights of retired military personnel, etc.) which the appellant's brief insists upon pressing yet it seems necessary, under the circumstances, to do so.

V

Dual compensation statutes and statutes respecting retired military and naval officers

Appellant states in his brief (p. 18) that "Appellee below referred to, and quoted from" certain dual compensation statutes and proceeds to show wherein such statutes do not apply to the instant matter. This appellee agrees that the dual compensation statutes do not apply here and that any reference below to such statutes by appellee was forced upon him because of appellant's seeking relief under said statutes in briefs filed below. Both appellant and appellee being in agreement that the dual compensation statutes do not apply here it is unnecessary to discuss such statutes and the court precedents thereunder. It is sufficient to say that the retirement of a civilian employee relates to *status*—not the holding of a *position* or *office* which involves more or less performing the duties thereof, and because of his disability to perform such duty the appellant here was retired from holding a *position* or *office*.

The statement on page 4 of appellant's brief that prior to the Civil Service Retirement Act of May 22, 1920, 41 Stat. 614, "there was no prohibition against any individual holding two offices in the Federal Government which were compatible" is inconsistent with that on page 18 where are cited and discussed acts prior to the Civil Service Retirement Act of May 22, 1920, and relating to dual compensation.

In the attempt of appellant to draw an analogy between the status of retired Foreign Service officers and retired military officers he overlooks the fact that by statute retired officers of the *Army* and *Navy* constitute a *component part of the United States Army and Navy*. Section 2 of National Defense Act, as amended June 4, 1920, 41 Stat. 759, and section 1457, Revised Statutes (Appendix, page 56). See, also, *Franklin v. United States*, 29 Ct. Cls. 6; 29 Op. Atty. Gen. 503. Retired officers of the Foreign Service, however, do not constitute a component part of the Foreign Service of the United States, and do not while retired hold a *position* or *office* under the Foreign Service of the United States.

There are special statutes which expressly authorize retired Army and Navy officers to hold a civilian office in the Government of the United States, with concurrent payment of retired annuity and civilian compensation within certain limitations (section 2 of the act of July 31, 1894, 28 Stat. 205; section 6 of the act of May 10, 1916,

39 Stat. 120, as amended August 29, 1916, 39 Stat. 582; act of June 30, 1932, 47 Stat. 406. Appendix, page 51). No such authority has been extended to retired Foreign Service officers since the only such authority, contained in the act of May 24, 1924, is believed to have been repealed by the act of February 23, 1931.

While certain members of the Foreign Service may from time to time be assigned to places where there may be involved "the rigors of cold climate or the fevers or heat of torrid climates"—page 6 of appellant's brief—it is equally true that many assignments are made to places where the climate, etc. may be as favorable, or more so, than ours. But the Foreign Service of the State Department is not alone in the matter of such foreign assignments—there being many employees of other branches of the executive civil service of the United States assigned to places outside the continental limits of the United States. For instance, bill S. 988, 75th Congress, First Session, providing among other things for a separate retirement act for officers of the Foreign Commerce Service of the Department of Commerce, provided under section 9 (k), as follows:

The Secretary is authorized from time to time to establish a list of places which *by reason of climatic or other extreme conditions are to be classed as unhealthful posts*, and each year of duty subsequent to July 1, 1912, at such posts, inclusive of regular leaves of absence, of officers and clerks here-

after retired, shall be counted as one year and a half, and so on, in like proportion in reckoning the length of service: * * *
[Italics supplied.]

When the bill passed the Congress, however, the entire provisions of the above section 9 (k) were stricken out. In connection with that proposed legislation the following comment was made by the Acting Director of the Budget in letter dated May 24, 1937, to the author of the bill, the late Senator Royal S. Copeland, at page 3 of Senate Report No. 921, 75th Congress, First Session:

My letter of April 8 made reference to retirement laws for other special groups of Federal personnel and to constant efforts of still other groups for special retirement legislation. *Present-day conditions of Federal service would seem to justify little if any difference in benefits and provisions for retirement of any particular group.* It would appear more advisable to compensate for any differences in service conditions as is generally done in the salaries paid for active duty service. (Emphasis supplied.)

The bill was vetoed by the President on June 20, the concluding paragraph of the memorandum of disapproval reading as follows:

The whole subject of coordinating the work of several departments and agencies of the government which relates to foreign service is under study, and, I believe, should be acted on comprehensively at the next session of the Congress. Disapproval of

this measure is recommended by the State Department, the Civil Service Commission and the Director of the Budget.

However, any service by Foreign Service Officers of the State Department which may involve "the rigors of cold or the fevers or heat of torrid climates" is compensated for the purposes of retirement by the provisions of section 26 (k) of the act of February 23, 1931, 46 Stat. 1212, as follows:

(k) The President is authorized from time to time to establish, by Executive order, *a list of places which by reason of climatic or other extreme conditions are to be classed as unhealthful posts*, and each year of duty subsequent to January 1, 1900, at such posts inclusive of regular leaves of absence, of officers already retired or hereafter retired, *shall be counted as one year and a half*, and so on in like proportion in reckoning the length of service for the purpose of retirement, fractional months being considered as full months in computing such service: *Provided, however*, That the President may at any time cancel the designation of any places as unhealthful without affecting any credit which has accrued for service at such posts prior to the date of the cancellation. (Emphasis supplied.)

The list of such unhealthful posts was embodied in Executive Order No. 5644 dated June 8, 1931, and later supplemented by Executive Order No. 6942 dated January 8, 1935, but the appellant makes no claim that he at any time served at any of

the posts classed by the President as unhealthful.

Any argument, therefore, in an attempt to set up an analogy between retired Foreign Service Officers and retired military officers as the appellant seeks to do, particularly as regards their [Foreign Service Officers] alleged subjection to "rigors of cold or * * * torrid climates", seems wholly irrelevant to the question raised by the pleadings and tends to confuse the issues rather than to assist in the solution thereof.

VI

It is immaterial that the retirement of Foreign Service officers is administered separate and apart from the Civil Retirement Act of May 22, 1920, as amended

The legislative history surrounding the enactment of the retirement provisions relating to Foreign Service officers as contained in the act of May 24, 1924, tends to show that the reason for administering retirement benefits to this class of personnel, separate and apart from the Civil Retirement Act of May 22, 1920, was to avoid complicating the administration of the latter act and to arrive at a somewhat simpler form of expression in effecting an adaptation of the then existing Civil Service Retirement Act of 1920, to the Foreign Service bill.

The fact that the retirement provisions relating to Foreign Service officers are administered separate and apart from the Civil Service Retirement Act of 1920, does not change the unbroken rule applied by the accounting officers of the Government

that, in the absence of a statute expressly providing otherwise, the concurrent payments of retired annuity and active civilian pay from the Government would be wholly inconsistent with the basic purpose underlying civil retirement legislation.

The retirement provisions of the Lighthouse Service are embodied in the organic act of June 20, 1918, 40 Stat. 608—an act prior to and separate and apart from the Civil Service Retirement Act of 1920—but the principle stated in the preceding paragraph has been applied as to that class of employees. 10 Comp. Gen. 309.

Also, the Panama Canal Retirement Act of March 2, 1931, 46 Stat. 1471, embodies the retirement provisions relating to employees of the Panama Canal on the Isthmus of Panama and the Panama Railroad Company on the Isthmus of Panama. That act is likewise separate and apart from the Civil Retirement Act of 1920—section 17 providing in pertinent part:

This act shall take effect July 1, 1931, and from and after that date the provisions of the Civil Service Retirement Act of May 22, 1920, as amended, shall not apply to employees of the Panama Canal on the Isthmus of Panama or to any other employees coming within the provisions of this Act:

* * *

Here, again, the Comptroller General of the United States in a decision regarding the right of an employee retired under said 1931 act to receive,

concurrently, active civilian compensation from the Government, held (14 Comp. Gen. 586, 588)—

Independently of the terms of the Panama Canal Retirement Act cited by you and notwithstanding that the provisions of the Civil Retirement Act more specifically safeguard against such dual payments by the Government—payment of retirement annuity at the same time the annuitant is drawing pay for active service—such dual payments would be wholly inconsistent with the basic purpose underlying civil retirement legislation and would violate a broad principle long recognized in governmental affairs. 10 Comp. Gen. 309; 13 *id.* 54; 14 *id.* 285, 288; *id.* 425, 426.

While appellant in his brief attempts to establish a right in himself to concurrent payment of retired annuity and other civilian compensation from the Government because of the fact the Foreign Service retirement provisions are separate and apart from the Civil Service Retirement Act of May 22, 1920, it seems quite clear that the principle just discussed is not destroyed by reason of the Foreign Service retirement provisions being “carved out of the Civil Service Retirement Act of 1920.” (Page 9 of the appellant’s brief.)

See section 204 of the act of June 30, 1932, 47 Stat. 404 (particularly the second proviso thereof) and section 8 (a) of the act of June 16, 1933, 48 Stat. 305 (particularly the proviso therein) (Ap-

pendix, pages 52, 53), which lend recognition to the principle that the receipt of retired annuity concurrently with active civilian compensation is incompatible; also, 13 Comp. Gen. 54.

VII

Principles of the retirement provisions of the Civil Service Retirement Act of May 22, 1920, made applicable to the retirement provisions of the act of May 24, 1924

The principles of the Civil Service Retirement Act of 1920 appear applicable to the Foreign Service so far as not expressly changed by statute. In this connection the Court's attention is invited to the following:

1. That the first bill introduced "For the reorganization and improvement of the Foreign Service of the United States and for other purposes" was H. R. 12543, introduced on September 1, 1922, in the 67th Congress, 2nd Session, section 17, of which was as follows:

Sec. 17. That the provisions of the Act approved May 22, 1920, entitled "An Act for the retirement of employees in the classified civil service, and for other purposes" are hereby made applicable to Foreign Service officers with the modifications hereinafter stated, to wit.

There are numerous modifications stated but it is unnecessary to state them all here other than to say that the modifications related chiefly as to the

age of retirement, the rate of contribution, and the rate of annuity.

This bill failed of passage. A later bill, H. R. 13880, introduced on January 17, 1923, in 67th Congress, 4th Session, contained a provision identical with that quoted above from H. R. 12543.

2. Senate Report No. 532, dated May 12, 1924, relating to the bill for REORGANIZATION AND IMPROVEMENT OF THE FOREIGN SERVICE, which finally became law—act of May 24, 1924—states that the scope of the bill is covered by four fundamental proposals, the fourth of which only is deemed apposite here, to wit:

A retirement system based upon the principles of the civil-service retirement and disability act of May 22, 1920, but administered entirely separately therefrom.

3. In a letter dated October 8, 1923, from the then Secretary of State (now Chief Justice) Hughes to the President, contained in said Senate Report No. 532, there were stated, among other things, the following:

Owing to the length of time that the Diplomatic and Consular Services have been on a civil-service basis, there are a number of positions, especially in the Consular Service, being held by officers advanced in years whose retention impairs the efficiency of the

service as a whole. It has become urgently necessary to provide for the retirement of these officers, *and in view of the fact that both branches of the service are well established on a civil-service basis it appears feasible to bring them under the provisions of the civil service retirement act of May 22, 1920*, modified only as to the age of retirement, the rate of contribution, and the rate of annuity. The immediate benefits of such an enactment would be appreciable. In fact, no proposal in connection with the improvement of the foreign service commends itself to my judgment with greater force. The inauguration of the system of retirement upon annuities would entail no additional appropriation it is estimated, until 1936. (Emphasis supplied.)

4. A similar statement was contained in a letter dated October 13, 1922, from the then Secretary of State Hughes to the author of the bill.

The foregoing statements regarding the 1924 act authorizing retirement benefits to employees of the Foreign Service appear sufficient to show that the Congress, as well as the sponsors of the law, had in mind the application of the *principles* of the Civil Retirement Act of 1920 and not the principles of retired legislation affecting *Army* and *Navy* officers.

VIII

The Acting Comptroller General of the United States in holding that the appellant was not entitled to receive civilian retired annuity during such time as he was also in receipt of compensation while employed by the Government, applied a long line of precedents established by the accounting officers of the Government

Regarding the principles of *civil* retirement legislation the accounting officers of the Government have held in a long line of decisions that the purpose and intent of civil retirement legislation is entirely inconsistent with the dual payment of active service pay and civil retirement *annuity* to the same person for the same period of time, and particularly where retirement was made because of *total* disability as in the instant case of the appellant. (Applicable decisions of the accounting officers cited below.) The various provisions of the Civil Retirement Act limit its benefits to employees who are not in the active service of the United States in any capacity and also prohibit dual payments of annuity and disability compensation under the Employees' Compensation Act of September 7, 1916, 39 Stat. 742. See section 2, act of July 3, 1926, 44 Stat. 905 (Appendix, page 54), prohibiting reemployment, section 6, act of July 3, 1926, 44 Stat. 908 (Appendix, page 55), requiring discontinuance of *annuity when there has been such a recovery as to enable the employee to be re-employed* (not necessarily to the same position occupied at time of retirement), and prohibiting

dual payments of disability retirement *annuity* and disability compensation, and section 7, act of July 3, 1926, 44 Stat. 909 (Appendix, page 55), requiring discontinuance of involuntary separation *annuity* upon reemployment. 13 Comp. Gen. 54, 133; 14 *id.* 285, 527, 586, 865. Even prior to the passage of the amendatory act of July 3, 1926, 44 Stat. 904 (amending the Civil Retirement Act of 1920), which prohibited reemployment after retirement, the Comptroller of the Treasury held in 27 Comp. Dec. 524 (syllabus) that:

Reemployment in the Government service of employees retired under provisions of the act of May 22, 1920, 41 Stat. 614, is prohibited.—Cf. 27 Comp. Dec. 858.

This principle has been applied in construing the Lighthouse Retirement Act of June 20, 1918, 40 Stat. 608—a retirement act which was passed prior to the 1920 act—which act, like the 1931 act under which the appellant here was retired—contained no provision prohibiting reemployment. 10 Comp. Gen. 309; 16 *id.* 121. To the knowledge of appellee none of the cited decisions of the accounting officers of the Government has been questioned in any proceeding except in the instant cause.

The appellant in his brief seeks to establish a right in himself to draw retired annuity and compensation for active service concurrently on the ground that there is no law expressly prohibiting the concurrent receipt of said two benefits. A similar *argument* was advanced in the case of *Pate*

v. *United States*, 78 Ct. Cls. 395, in which case the plaintiff sought a right to retired pay as a retired enlisted man of the Regular Army and also as a retired emergency officer of the World War, but the Court, in denying such right, stated in that case at page 400 that:

* * * The policy of the Government has always been against double pensions and compensations. It is no concern of this court from what funds the plaintiff is paid so long as he received the full amount from the Government to which he is entitled.

The Supreme Court for the District of Columbia, had previously denied *Pate* the writ of mandatory injunction sought to compel the payment concurrently of the two benefits. See, also, to the same effect, *Hines v. United States, ex rel. Cavanagh*, 39 Fed. (2) 517; *United States ex rel. Bowling v. Hines*, 50 Fed. (2) 330.

So also here, retired *annuity* granted to the plaintiff, who was retired because of his becoming "totally disabled for useful and efficient service" is incompatible with active duty compensation. Payment of both for the same period of time contravenes the policy of the Government declared in the *Pate case, et al, supra*, and in the numerous decisions of the accounting officers of the Government, when the right to payment of both benefits in such cases was sought solely upon the ground that payment thereof was not prohibited by law.

Furthermore, the Government of the United States operates its business upon the *positive* law; not upon the *negative* law. The matter here is not one of appropriation being available for any use *not specially prohibited* by law or regulation, but of appropriation being available for purposes *affirmatively* authorized by law. Therefore, the mere fact that the Foreign Service retirement act does not *expressly* prohibit a retired Foreign Service officer in receipt of retired annuity from receiving active civilian compensation while reemployed in the Executive Civil Service of the United States (except as provided in section 27 of the 1931 act) does not establish that such dual payments are authorized as contended by the appellant. No statute or court decision in support of that contention, is cited.

IX.

The executive civil service

Appellant in his brief (page 17) appears to claim some merit from the fact that his reemployment is temporary and is not in the classified Civil Service and questions that there exists "an Executive Civil Service."

The Civil Service, broadly, is a civilian service as distinguished from a military or a naval service, and such civilian service may be in the Classified Civil Service—as a result of competitive examination—or in the Unclassified Civil Service—the ap-

pointment not resulting from a competitive examination. This appears from the provisions of the Retirement Act of 1920, permitting the counting of all civilian employment irrespective of whether it was through an appointment under competitive examination or whether it was simply appointment under an exception authorized by an act of Congress in connection with a particular agency—emergency or otherwise. Yet, civilian service may not be included by military personnel in the computation of their length of service. *Josephine L. Schreiner, admx. v. United States*, 43 Ct. Cls. 480.

Obviously, therefore, the fact that the appellant occupies a temporary position—in unclassified Civil Service—in nowise alters the rule against dual payments of retirement annuity and active civilian compensation from the Government.

The term, “Executive Civil Service,” is one used to distinguish civilian employment in the Executive Departments or Independent Agencies as distinguished from the military or naval services of the Executive Branch of the Government. The term is a well-understood term and is used frequently by the United States Civil Service Commission and by the General Accounting Office. See Plaintiff’s Exhibit A (R. 10, 13). The term appears frequently, also, in the rules promulgated by the President under the organic Civil Service Act. See, for instance, section 1 of Rule 1, “No person in the executive civil service shall use * * *”; section 3 of Rule IV, “Per-

sons in the executive civil service shall facilitate * * *.” So, also, has the Attorney General referred to the term, *executive civil service*, in his opinions. See, for instance, 37 Op. Atty. Gen. 121, relating to positions with insolvent national banks, wherein the following was said, page 122:

* * * As they are employed by the executive branch of the Government to perform duties under the statute, they are in the *executive civil service* of the United States. The fact that these employees are not paid from funds appropriated by Congress does not affect their status as employees in the *executive civil service* of the United States. * * * [Italics supplied.]

While, therefore, the appellant may not be in the so-called Classified Civil Service, i. e., appointed as a result of a competitive examination, he is nevertheless in the Executive Civil Service while holding a temporary position as a civilian employee of the Government of the United States whether that appointment results from a competitive examination or otherwise.

X.

Reemployment in the Service of the United States

The term “reemployment” as used in the decision of the accounting officers of the Government has not been given the meaning alleged by the appellant in his brief (pp. 15-17), namely “reemployment in the service from which one has retired.”

While that happened to be the situation in 10 Comp. Gen. 309, it was not the situation in 13 Comp. Gen. 54; 14 Comp. Gen. 285; *id.* 586. The statement used as a caption in appellant's brief, page 15, namely, "The Accounting Officers have never Prior to the Instant Case Rendered a Decision that One on an Annuity Could Not Receive Pay for Services in a Department Other than that to Which the Annuitant Had Been Connected" is not true, as the decisions just cited will establish. Suffice it to say, therefore, that the term "reemployment" as used in the decisions of the accounting officers of the Government means reemployment by the Government of the United States whether in the particular branch from which the employee was retired or in some other branch.

It may well be said, too, that employment while in receipt of an *annuity* which is based upon total *disability* would presumptively be evidence that there was a recovery, and termination of the annuity logically would ensue on grounds of public policy. Furthermore, it is pertinent to note the provisions of section 27 of the 1931 retirement act, 46 Stat. 1213, under which the appellant here was retired—said section reading as follows:

In the event of public emergency any retired Foreign Service officer may be recalled temporarily to active service by the President, and while so serving he shall be entitled *in lieu of his retirement allowance* to the full pay of the class in which he is temporarily serving. [Italics supplied.]

If a *retired* Foreign Service officer who is *temporarily* called into the Foreign Service is forbidden, under the above-quoted provisions of the 1931 act, to draw concurrently retired *annuity* for total disability and active pay while so reemployed, it is a logical sequence that in the absence of a statute otherwise providing, he may not draw concurrently his retired *annuity* and active service pay while so reemployed in another branch of the Executive Civil Service of the Government of the United States in which branch its own members are forbidden to receive an annuity for total disability when fit for reemployment. It is pertinent to note, too, that reemployment under section 27 of the 1931 statute, *supra*, is not required to be in a position paying the same salary as that which the annuitant was receiving at time of retirement. Reemployment under the provisions of said statute may be to a position of a low salary grade. This is wholly unlike the statute respecting retired *Army* and *Navy* officers who may be recalled to service and when so recalled ordinarily are entitled to receive the pay and allowance of the grade and office in which retired.

XI

Appellant has filed suit in the Court of Claims to recover retired annuity withheld by reason of appellee's decision in the instant case

On March 3, 1938, the appellant here filed a petition in the Court of Claims of the United States, Docket No. 43855, praying for judgment against

the United States "for his retirement pay from the 1st day of August 1936, to date hereof, together with interest thereon at 6 per cent per annum." Reference of this matter by the appellant to the Court of Claims is, in effect, an admission that that Court has jurisdiction to decide the law of the case—and we contend it has such jurisdiction—and it is to be assumed that said Court will proceed to judgment which shall be binding upon the departments for their guidance and action. *White Earth Roll Case*, 50 Ct. Cls. 19; *Blazek v. United States*, 44 Ct. Cls. 188. Aside from the well-settled rule that Equity will not entertain jurisdiction in a matter where the aggrieved party has a plain, adequate, and complete remedy at law it would seem that the filing of the suit in the Court of Claims is a concession that the present proceeding is not well founded.

XII

The action of the Acting Comptroller General of the United States in this case involved judgment and discretion and he may not be coerced in this suit in mandatory injunction to take contrary action; in any event, the right of appellant, if any, is not so clear as to warrant the issuance of an injunctive writ

The right to receive retired annuity concurrently with active compensation while employed by the Government *is not provided for by statute*. In the consideration of this case, therefore, the Acting Comptroller General of the United States was

required to consider other statutes having relation to the matter, the legislative history, the applicable principles underlying civilian retirement, etc.

It has been a broad principle long recognized in Governmental affairs that, in the absence of a statute expressly providing otherwise, payment of retirement annuity at the same time the annuitant is drawing pay for active service while employed by the Government of the United States is wholly inconsistent with the basic purpose underlying civil retirement legislation. This principle—long followed by the accounting officers of the Government—has not heretofore been challenged in a court.

What the appellant is attempting to do in this proceeding for mandatory injunction is to *establish* a legal right; not to *enforce a legal right already established*. It is settled that legal rights may not be established in proceedings for mandamus or mandatory injunction. *Work v. United States ex rel Rives*, 267 U. S. 175; *United States v. Deming*, 57 App. D. C. 223, 19 Fed. (2) 697, certiorari denied 275 U. S. 531; also, *Morrison v. Work*, 266 U. S. 481; *Hines v. Welch*, 23 Fed. (2) 979.

The appellant has failed utterly to establish the existence of an indisputable and plain legal right to draw concurrently retired *annuity* for total disability and active civilian service compensation at the same time, such as he must establish to warrant

the issuance of a writ of mandatory injunction. Such process will not issue to protect a *right not in esse*. *Irwin v. Dixon*, 9 How. 10, 28; *Truly v. Wanzer*, 5 How. 141, 142; *Burroughs v. City of Dallas*, 276 Fed. 812.

It is a general rule that mandatory injunction, like mandamus, will not issue when the right sought to be protected is in doubt or where the right to the relief asked for is doubtful. See authorities under (2), *supra*; also *I. C. C. v. New York, N. H. & H. R. R. Co.*, 287 U. S. 178, 204; *Central Stockyards Co. v. Louisville, etc. R. R. Co.*, 112 Fed. 823; *Owsley v. Yerkes*, 185 Fed. 686; *Quigley Pub. Co. v. Showmen's Round Table, Inc.*, 7 Fed. Supp. 410; *United States ex rel Girard Trust Co. v. Helvering*, 301 U. S. 540.

It is the general rule, also, that when the principles of law on which the right to injunction rests are disputed and will admit of doubt, a Court of Equity will not grant such injunction without a decision of the Courts of Law establishing such principles. *Bonaparte v. Camden, etc. R. Co.*, 3 Fed. Cas. No. 1617.

The appellant does not complain of a *legal* injury but a mere *inconvenience* only, in which case injunctive relief will not lie. *New York v. Illinois*, 274 U. S. 488.

The right of the appellant, if any, is not so clear as to warrant the issuing of the injunctive writ

such as that prayed for by the appellant—the matter presented to the Acting Comptroller General involving the exercise of sound judgment and discretion and his official action in this matter not being for review or revision in injunctive proceedings, *United States v. Lynch*, 137 U. S. 280; *United States ex rel Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 325; *Wilbur v. United States ex rel Kadrie*, 281 U. S. 206; *United States ex rel L. Margulies & Sons v. McCarl, etc.*, 10 Fed. (2) 1012, 52 App. D. C. 147, certiorari denied, 273 U. S. 696; *United States ex rel Corbin v. Doyle*, 93 Fed. (2) 646, 68 App. D. C. 100; *United States ex rel Crow v. Mitchell*, 89 Fed. (2) 805, 67 App. D. C. 61.

The appellant has a plain, adequate, and complete remedy at law by a suit in the Court of Claims where the United States may be made a party to the suit and where the appellant's claim is authorized to be decided on its merits. Section 267 of the Judicial Code, Act of March 3, 1911, 36 Stat. 1163, 28 U. S. C. 384; *Hurley et al. v. Kincaid*, 285 U. S. 95; *Wilson v. Shaw*, 204 U. S. 24. There is thus no question of multiplicity of suits, as raised on page 3 of appellant's brief, and the *McCabe case* cited on page 21 of appellant's brief has no application whatever to the facts involved in the present proceeding.

CONCLUSION

Upon the whole case it is submitted that the action of the court below in discharging the Rule and dismissing the Bill of Complaint was proper and should be affirmed with costs.

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A P P E N D I X

STATUTES INVOLVED

ACT OF MAY 24, 1924, 43 STAT. 140, 144

SEC. 18. The President is authorized to prescribe rules and regulations for the establishment of a Foreign Service retirement and disability system to be administered under the direction of the Secretary of State and in accordance with the following principles, to wit:

(a) The Secretary of State shall submit annually a comparative report showing all receipts and disbursements on account of refunds, allowances, and annuities, together with the total number of persons receiving annuities and the amounts paid them, and shall submit annually estimates of appropriations necessary to continue this section in full force and such appropriations are hereby authorized: *Provided*, That in no event shall the aggregate total appropriations exceed the aggregate total of the contributions of the Foreign Service officers theretofore made, and accumulated interest thereon.

(b) There is hereby created a special fund to be known as the Foreign Service retirement and disability fund.

(c) Five per centum of the basic salary of all Foreign Service officers eligible to retirement shall be contributed to the Foreign Service retirement and disability fund and the Secretary of the Treasury is directed on the date on which this Act

takes effect to cause such deductions to be made and the sums transferred on the books of the Treasury Department to the credit of the Foreign Service retirement and disability fund for the payment of annuities, refunds, and allowances: *Provided*, That all basic salaries in excess of \$9,000 per annum shall be treated as \$9,000.

* * * * *

(e) Annuities shall be paid to retired Foreign Service officers under the following classification, based upon length of service and at the following percentages of the average annual basic salary for the ten years next preceding the date of retirement: Class A, thirty years or more, 60 per centum; class B, from twenty-seven to thirty years, 54 per centum; class C, from twenty-four to twenty-seven years, 48 per centum; class D, from twenty-one to twenty-four years, 42 per centum; class E, from eighteen to twenty-one years, 36 per centum; class F, from fifteen to eighteen years, 30 per centum.

* * * * *

(j) That any Foreign Service officer who before reaching the age of retirement becomes totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part, shall, upon his own application or upon order of the President, be retired on an annuity under paragraph (e) of this section: *Provided, however*, That in each case such disability shall be determined by the report of a duly qualified physician or surgeon designated by the Secretary of State to conduct the examination: *Provided further*, That unless the

disability be permanent, a like examination shall be made annually in order to determine the degree of disability and the payment of annuity shall cease from the date of the medical examination showing recovery.

* * * * *

(k) The President is authorized from time to time to establish, by Executive order, a list of places in tropical countries which by reason of climatic or other extreme conditions are to be classed as unhealthful posts, and each year of duty at such posts, while so classed, inclusive of regular leaves of absence, shall be counted as one year and a half, and so on in like proportion in reckoning the length of service for the purposes of retirement.

* * * * *

(m) Whenever any Foreign Service officer, after the date of his retirement, accepts a position of employment the emoluments of which are greater than the annuity received by him from the United States Government by virtue of his retirement under this Act, the amount of the said annuity during the continuance of such employment shall be reduced by an equal amount: *Provided*, That all retired Foreign Service officers shall notify the Secretary of State once a year of any positions of employment accepted by them, stating the amount of compensation received therefrom and whenever any such officer fails to so report it shall be the duty of the Secretary of State to order the payment of the annuity to be suspended until such report is received.

* * * * *

(p) For the purposes of this Act the period of service shall be computed from the date of original oath of office as secretary in the Diplomatic Service, consul general, consul, vice consul, deputy consul, consular assistant, consular agent, commercial agent, interpreter, or student interpreter, and shall include periods of service at different times in either the Diplomatic or Consular Service, or while on assignment to the Department of State, or on special duty, but all periods of separation from the service and so much of any period of leave of absence as may exceed six months shall be excluded: *Provided*, That service in the Department of State prior to appointment as a Foreign Service officer may be included in the period of service, in which case the officer shall pay into the Foreign Service retirement and disability fund a special contribution equal to 5 per centum of his annual salary for each year of such employment, with interest thereon to date of payment compounded annually at 4 per centum.

SEC. 19. In the event of public emergency any retired Foreign Service officer may be recalled temporarily to active service by the President and while so serving he shall be entitled in lieu of his retirement allowance to the full pay of the class in which he is temporarily serving.

SEC. 20. That all provisions of law heretofore enacted relating to secretaries in the Diplomatic Service and to consular officers, which are not inconsistent with the provisions of this Act, are hereby made applicable to Foreign Service officers when they are designated for service as diplomatic or as consular officers, and that all Acts or parts of

Acts inconsistent with this Act are hereby repealed.

ACT OF FEBRUARY 23, 1931, 46 STAT. 1207

SEC. 7. That the Act (Public Numbered 135, Sixty-eighth Congress) approved May 24, 1924, entitled "An Act for the reorganization and improvement of the Foreign Service of the United States, and for other purposes", be, and the same is hereby, amended to read as follows:

"SEC. 26. The President is authorized to prescribe rules and regulations for the establishment of a Foreign Service retirement and disability system to be administered under the direction of the Secretary of State and in accordance with the following principles, to wit:

* * * * *

"(e) Annuities shall be paid to retired Foreign Service officers under the following classification, based upon length of service and at the following percentages of the average annual basic salary for the ten years next preceding the date of retirement: Class A, thirty years or more, 60 per centum; Class B, from twenty-seven to thirty years, 54 per centum; Class C, from twenty-four to twenty-seven years, 48 per centum; Class D, from twenty-one to twenty-four years, 42 per centum; Class E, from eighteen to twenty-one years, 36 per centum; Class F, from fifteen to eighteen years, 30 per centum: *Provided, however,* That in computing the average annual basic salary for the ten years next preceding the date of retirement, so much of an officer's service as was rendered prior to July 1, 1924, in accordance with the classification and

salaries established by laws then in effect, as it is possible to credit to him by applying to all such periods of service rendered prior to July 1, 1924, the rules for corresponding classes in the reclassification provisions in section 7 of the Act of May 24, 1924, shall be considered as having been performed in accordance with the classifications and salaries established for Foreign Service officers in section 3 of the Act of May 24, 1924: *And provided further*, That no increases in annuities under this Act shall operate retroactively and nothing in this Act shall be interpreted as reducing the rate of the annuity received by any retired officer on the effective date of this Act.

* * * * *

“(j) That any Foreign Service officer who, before reaching the age of retirement becomes totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part, shall, upon his own application or upon order of the President, be retired on an annuity under paragraph (e) of this section: *Provided, however*, That in each case such disability shall be determined by the report of a duly qualified physician or surgeon designated by the Secretary of State to conduct the examination: *Provided further*, That unless the disability be permanent, a like examination shall be made annually in order to determine the degree of disability, and the payment of annuity shall cease from the date of the medical examination showing recovery.

* * * * *

“(k) The President is authorized from time to time to establish, by Executive order, a list of

places which by reason of climatic or other extreme conditions are to be classed as unhealthful posts, and each year of duty subsequent to January 1, 1900, at such posts inclusive of regular leaves of absence, of officers already retired or hereafter retired, shall be counted as one year and a half, and so on in like proportion in reckoning the length of service for the purpose of retirement, fractional months being considered as full months in computing such service: *Provided, however,* That the President may at any time cancel the designation of any places as unhealthful without affecting any credit which has accrued for service at such posts prior to the date of the cancellation.

* * * * *

“(o) For the purposes of this Act the period of service shall be computed from the date of original oath of office as diplomatic secretary, consul general, consul, vice consul, deputy consul, consular assistant, consular agent, commercial agent, interpreter, or student interpreter, and shall include periods of service at different times as either a diplomatic or consular officer, or while on assignment to the Department of State, or on special duty or service in another department or establishment of the Government, but all periods of separation from the service and so much of any period of leave of absence without pay as may exceed six months shall be excluded: *Provided,* That service in the Department of State or as clerk in a mission or consulate prior to appointment as a Foreign Service officer may be included in the period of service, in which case the officer shall pay into the Foreign Service retirement and disability fund a special contribution equal to 5 per centum of his

annual salary for each year of such employment, with interest thereon to date of payment compounded annually at 4 per centum, provided that such special contribution shall be subject to the limitations established by subdivision (f) of this section.

“SEC. 27. In the event of public emergency any retired Foreign Service officer may be recalled temporarily to active service by the President, and while so serving he shall be entitled in lieu of his retirement allowance to the full pay of the class in which he is temporarily serving.

“SEC. 28. That all provisions of law heretofore enacted relating to diplomatic secretaries and to consular officers, which are not inconsistent with the provisions of this Act, are hereby made applicable to Foreign Service officers when they are designated for service as diplomatic or consular officers, and that all Acts or parts of Acts inconsistent with this Act are hereby repealed.”

ACT OF JULY 31, 1894, 28 STAT. 205

SEC. 2. * * * No person who holds an office the salary or annul compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate.

ACT OF AUGUST 29, 1916, 39 STAT. 582

Section six of an Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and seventeen, namely:" approved May tenth, nineteen hundred and sixteen, is hereby amended so as to read as follows:

"Sec. 6. That unless otherwise specially authorized by law, no money appropriated by this or any other Act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of \$2,000 per annum, but this shall not apply to retired officers or enlisted men of the Army, Navy, Marine Corps, or Coast Guard, or to officers and enlisted men of the Organized Militia and Naval Militia in the several States, Territories, and the District of Columbia: *Provided*, That no such retired officer, officer, or enlisted man shall be denied or deprived of any of his pay, salary, or compensation as such, or of any other salary or compensation for services heretofore rendered, by reason of any decision or construction of said section six."

ACT OF JUNE 30, 1932, 47 STAT. 406

SEC. 212. (a) After the date of the enactment of this Act, no person holding a civilian office or position, appointive or elective, under the United States Government or the municipal government of the District of Columbia or under any corporation, the majority of the stock of which is owned by the United States, shall be entitled, during the

period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in the Pay Adjustment Act of 1922 [U. S. C., title 37], at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than \$3,000; and when the retired pay amounts to or exceeds the rate of \$3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. As used in this section, the term "retired pay" shall be construed to include credits for all service that lawfully may enter into the computation thereof.

(b) This section shall not apply to any person whose retired pay plus civilian pay amounts to less than \$3,000: *Provided*, That this section shall not apply to regular or emergency commissioned officers retired for disability incurred in combat with an enemy of the United States.

ACT OF JUNE 30, 1932, 47 STAT. 404

SEC. 204. On and after July 1, 1932, no person rendering civilian service in any branch or service of the United States Government or the municipal government of the District of Columbia who shall have reached the retirement age prescribed for automatic separation from the service, applicable to such person, shall be continued in such service, notwithstanding any provision of law or regulation to the contrary: *Provided*, That the President may, by Executive Order, exempt from the provisions of this section any person when, in his judgment, the public interest so requires: *Provided further*,

That no such person heretofore or hereafter separated from the service of the United States or the District of Columbia under any provision of law or regulation providing for such retirement on account of age shall be eligible again to appointment to any appointive office, position, or employment under the United States or the District of Columbia: *Provided further*, That this section shall not apply to any person named in any Act of Congress providing for the continuance of such person in the service.

ACT OF JUNE 16, 1933, 48 STAT. 305

SEC. 8. (a) Whenever at any time hereafter prior to July 1, 1935, any employee of the United States or the District of Columbia to whom the Civil Service Retirement Act, approved May 29, 1930 (U. S. C., Supp. VI, title 5, chap. 14), applies, who has an aggregate period of service of at least thirty years computed as prescribed in section 5 of such Act, is involuntarily separated from the service for reasons other than his misconduct, such employee shall be entitled to an annuity computed as provided in section 4 of such Act payable from the civil service retirement and disability fund less a sum equal to $3\frac{1}{2}$ per centum of such annuity: *Provided*, That when an annuitant hereunder attains the age which would have been the retirement age prescribed for automatic separation from the service applicable to such annuitant had he continued in the service to such retirement age, such deduction from the annuity shall cease. If and when any such annuitant shall be reemployed in the service of the District of Columbia or the United States (including any corporation the ma-

jority of the stock of which is owned by the United States), the right to the annuity provided by this section shall cease and the subsequent annuity rights of such person shall be determined in accordance with the applicable provisions of retirement law existing at the time of the subsequent separation of such person from the service.

ACT OF JULY 31, 1894, 28 STAT. 206

The Auditors, under the direction of the Comptroller of the Treasury, shall superintend the recovery of all debts finally certified by them, respectively, to be due to the United States.

ACT OF JUNE 10, 1921, 42 STAT. 24

(Amending Section 4 of the act of July 31, 1894, *supra*)

SEC. 304. All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, * * * shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. * * *

ACT OF JULY 3, 1926, 44 STAT. 905, 908

SEC. 2. * * *

* * * * *

No person separated from the service who is receiving an annuity under the provisions of section 1 of this Act, shall be employed again in any position within the purview of this Act.

SEC. 6. * * *

* * * If an annuitant shall recover before reaching retirement age and be restored to an earning capacity which would permit him to be appointed to some appropriate position fairly comparable in compensation to the position occupied at the time of retirement, payment of the annuity shall be continued temporarily to afford the annuitant opportunity to seek such available position, but not in any case exceeding ninety days from the date of the medical examination showing such recovery. * * *

SEC. 7. * * *

* * * * *

Should an annuitant under the provisions of this section be reemployed in a position included in the provisions of this Act, or in any other position in the Government service, the annuity shall cease, and all rights and benefits under the provisions of this section shall terminate from and after the date of such employment.

SECTION 236, REVISED STATUTES, AS AMENDED BY SECTION 305 OF THE ACT OF JUNE 10, 1921, 42 STAT. 24

Section 236 of the Revised Statutes is amended to read as follows:

“SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.”

ACT OF JUNE 4, 1920, 41 STAT. 759

SEC. 2. Composition of the Regular Army: The Regular Army of the United States shall consist

of * * * ; the officers and enlisted men of the retired list; * * * .

SECTION 1457, REVISED STATUTES

Officers retired from active service shall be placed on the retired list of officers of the grades to which they belonged respectively at the time of their retirement, and continue to be borne on the Navy Register. They shall be entitled to wear the uniform of their respective grades, and shall be subject to the rules and articles for the government of the Navy and to trial by general court-martial. The names of officers wholly retired from the service shall be omitted from the Navy Register.

EXECUTIVE ORDER NO. 4255, DATED JUNE 18, 1925

ARTICLE II

RETIREMENT OF FOREIGN SERVICE OFFICERS

31. *Retirement of Foreign Service officers provided by law.*—The law provides for the retirement of Foreign Service officers on account of age or disability and authorizes the President to prescribe rules and regulations to give effect to the statute. The administration of the retirement system is placed under the direction of the Secretary of State.—*Act of May 24, 1924, Sec. 18.*

* * * * *

33. *Retirement on account of disability.*—Any Foreign Service officer who before reaching the age of retirement becomes totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance, or

willful misconduct on his part, is, upon his own application or upon order of the President, retired on an annuity. In each case such disability is determined by the report of a duly qualified physician or surgeon designated by the Secretary of State to conduct the examination. Unless the disability be permanent, a like examination is made annually in order to determine the degree of disability, and the payment of annuity ceases from the date of the medical examination showing recovery.

* * * * *

35. *Period of service.*—The period of service is computed from the date of original oath of office as secretary in the diplomatic service, consul general, consul, vice consul, deputy consul, consular assistant, consular agent, commercial agent, interpreter, or student interpreter, and includes periods of service at different times in either the diplomatic or consular service, or while on assignment to the Department of State, or on special duty, but all periods of separation from the service and so much of any period of leave of absence as may exceed six months are excluded. Service in the Department of State prior to appointment as a Foreign Service officer may be included in the period of service under certain conditions.—*Act of May 24, 1924, Sec. 18 (p).*

The President has the authority to establish by Executive order, a list of places in tropical countries which by reason of climatic or other extreme conditions are to be classed as unhealthful posts, and each year of duty at such posts, while so classed, inclusive of regular leaves of absence, shall

be counted as one year and a half, and so on in like proportion in reckoning the length of service for the purposes of retirement.—*Act of May 24, 1924, Sec. 18(k)*.

36. *Foreign Service Retirement and Disability Fund*.—Five per centum of the basic salary of all Foreign Service officers eligible to retirement is contributed to the Foreign Service Retirement and Disability Fund and the Secretary of the Treasury causes such deductions to be made and the sums to be transferred on the books of the Treasury Department to the credit of the Foreign Service Retirement and Disability Fund for the payment of annuities, refunds, and allowances, provided that all basic salaries in excess of \$9,000 per annum are treated as \$9,000.—*Act of May 24, 1924, Sec. 18(c)*.

In case service in the Department of State prior to appointment as a Foreign Service officer is included in the period of service, the officer shall pay into the Foreign Service Retirement and Disability Fund a special contribution equal to 5 per centum of his annual salary for each year of such employment, with interest thereon to the date of payment compounded annually at 4 per centum.—*Act of May 24, 1924, Sec. 18(p)*.

The Secretary of State submits annually a comparative report showing all receipts and disbursements on account of refunds, allowances, and annuities, together with the total number of persons receiving annuities and the amounts paid them, and submits also annually estimates of appropriations necessary to continue the retirement and disability system in full force. The law provides that in no event shall the aggregate total appropriations ex-

ceed the aggregate total of the contributions of the Foreign Service officers theretofore made, and accumulated interest thereon.—*Act of May 24, 1924, Sec 18 (a).*

The Secretary of the Treasury invests from time to time in interest-bearing securities of the United States such portions of the Foreign Service Retirement and Disability Fund as in his judgment may not be immediately required for the payment of annuities, refunds, and allowances, and the income derived from such investments constitutes a part of said Fund.—*Act of May 24, 1924, Sec. 18 (b) and (g).*

* * * * *

38. *Annuities.*—Annuities are paid to retired and disabled Foreign Service officers under the following classification, based upon length of service and at the following percentages of the average annual basic salary for the ten years next preceding the date of retirement:

Class A, 30 years or more, 60 per centum,
Class B, from 27 to 30 years, 54 per centum,
Class C, from 24 to 27 years, 48 per centum,
Class D, from 21 to 24 years, 42 per centum,
Class E, from 18 to 21 years, 36 per centum,
Class F, from 15 to 18 years, 30 per centum.

—*Act of May 24, 1924, Sec. 18 (e).*

39. *Employment after retirement.*—Whenever any Foreign Service officer, after the date of his retirement, accepts a position of employment, the emoluments of which are greater than the annuity received by him from the United States Government by virtue of his retirement under the Act of May 24, 1924, the amount of the said annuity dur-

ing the continuance of such employment is reduced by an equal amount. All retired Foreign Service officers must notify the Secretary of State once a year of any positions of employment accepted by them stating the amount of compensation received therefrom and whenever any such officer fails to so report it is the duty of the Secretary of State to order the payment of the annuity to be suspended until such report is received.—*Act of May 24, 1924, Sec. 18 (m).*

EXECUTIVE ORDER NO. 5642, DATED JUNE 8, 1931

ADMINISTRATION OF THE FOREIGN SERVICE

The regulations established in this Executive order shall be effective and binding not only as Consular Regulations, but they shall be equally effective and binding for the following purposes:

“(1) These rules and regulations shall constitute the regulations of the Department of State for the administration of the Foreign Service under the provisions of the act of February 23, 1931 (46 Stat. 1212), * * *.

* * * * *

“ARTICLE II

“RETIREMENT OF FOREIGN SERVICE OFFICERS

31. *Retirement of Foreign Service officers provided by law.*—The law provides for the retirement of Foreign Service officers on account of age or disability and authorizes the President to prescribe rules and regulations to give effect to the statute. The administration of the retirement system is

placed under the direction of the Secretary of State. (Act of Feb. 23, 1931, sec. 26.)

* * * * *

33. *Retirement on account of disability.*—Any Foreign Service officer who before reaching the age of retirement becomes totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part, shall, upon his own application or upon order of the President, be retired on an annuity. In each case such disability is determined by the report of a duly qualified physician or surgeon designated by the Secretary of State to conduct the examination. Unless the disability be permanent, a like examination is made annually in order to determine the degree of disability, and the payment of annuity ceases from the date of the medical examination showing recovery. The officer may thereupon be reassigned to active duty.

* * * * *

35. *Period of service.*—The period of service is computed from the date of original oath of office as diplomatic secretary, consul general, consul, vice consul, deputy consul, consular assistant, consular agent, commercial agent, interpreter, or student interpreter, and includes periods of service at different times as either a diplomatic or a consular officer, or while on assignment to the Department of State, or on special duty or service in another department or establishment of the Government, but all periods of separation from the service and so much of any period of leave of absence without pay as may exceed six months are excluded.

Service in the Department of State or as clerk in a mission or consulate prior to appointment as a Foreign Service officer may be included in the period of service. (Act of Feb. 23, 1931, sec. 26o.)

The President is authorized from time to time to establish, by Executive order, a list of places which by reason of climatic or other extreme conditions are to be classed as unhealthful posts; and each year of duty subsequent to January 1, 1900, at such posts, inclusive of regular leaves of absence, of officers already retired or hereafter retired, shall be counted as one year and a half, and so on in like proportion in reckoning the length of service for the purpose of retirement, fractional months being considered as full months in computing such service. The President may at any time cancel the designation of any places as unhealthful without affecting any credit which has accrued for service at such posts prior to the date of the cancellation. (Act of Feb. 23, 1931, sec. 26k.)

36. *Foreign Service retirement and disability fund.*—Five per centum of the basic salary of all Foreign Service officers eligible to retirement is contributed to the Foreign Service retirement and disability fund, and the Secretary of the Treasury causes such deductions to be made and the sums to be transferred on the books of the Treasury Department to the credit of the Foreign Service retirement and disability fund for the payment of annuities, refunds, and allowances.

All basic salaries in excess of \$10,000 per annum shall be treated as \$10,000. (Act of Feb. 23, 1931, sec. 26c.)

In case service in the Department of State or as clerk in a mission or consulate prior to appoint-

ment as Foreign Service officer is included in the period of service, the officer shall pay into the Foreign Service retirement and disability fund a special contribution equal to five per centum of his annual salary for each year of such employment, with interest thereon to the date of payment compounded annually at four per centum, but such special contribution shall be subject to the limitations established by section 26f of the act of February 23, 1931. (Act of Feb. 23, 1931, sec. 26o.)

The Secretary of State submits annually a comparative report showing all receipts and disbursements on account of refunds, allowances, and annuities, together with the total number of persons receiving annuities and the amounts paid them, and also submits annually estimates of appropriations necessary to continue the retirement and disability system in full force. The law provides that in no event shall the aggregate total appropriations exceed the aggregate total of the contributions of the Foreign Service officers theretofore made, and accumulated interest thereon. (Act of Feb. 23, 1931, sec. 26a.)

The Secretary of the Treasury invests from time to time in interest-bearing securities of the United States such portions of the Foreign Service retirement and disability fund as in his judgment may not be immediately required for the payment of annuities, refunds, and allowances, and the income derived from such investments constitutes a part of said fund. (Act of Feb. 23, 1931, sec. 26g.)

* * * * *

38. *Annuities.*—Annuities are paid to retired and disabled Foreign Service officers under the following classification, based upon length of service, and

at the following percentages of the average annual basic salary for the 10 years next preceding the date of retirement:

- Class A, 30 years or more, 60 per centum,
- Class B, from 27 to 30 years, 54 per centum,
- Class C, from 24 to 27 years, 48 per centum,
- Class D, from 21 to 24 years, 42 per centum,
- Class E, from 18 to 21 years, 36 per centum,
- Class F, from 15 to 18 years, 30 per centum.

In computing the average annual basic salary for the 10 years next preceding the date of retirement, so much of an officer's service as was rendered prior to July 1, 1924, in accordance with the classification and salaries established by laws then in effect, as it is possible to credit to him by applying to all such periods of service rendered prior to July 1, 1924, the rules for corresponding classes in the reclassification provisions in section 7 of the act of May 24, 1924, shall be considered as having been performed in accordance with the classifications and salaries established for Foreign Service officers in section 3 of the act of May 24, 1924; but increases in annuities effected on July 1, 1931, under this provision shall not operate retroactively, and the provisions shall not be interpreted as reducing the rate of annuity received by any retired officer on July 1, 1931. (Act of Feb. 23, 1931, sec. 26e.)

